

**ONTARIO PUBLIC SERVICE  
LABOUR RELATIONS TRIBUNAL  
DECISIONS**

TRIBUNAL DECISIONS

1989













# ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL DECISIONS

1989

File No.	Date	Type and Disposition	Indexed
T/0001/89-1	July 3/90	Duty of Fair Representation; Preliminary	Yes
T/0001/89-2	Nov. 7/90	Dismissed	Yes
T/0002/89 - see T/0001/89			
T/0005/89	July 23/90	Employee Status; Dismissed	Yes
T/0007/89 - see T/0001/89			
T/0013/89	Dec. 16/91	Employee Status; Dismissed	Yes
T/0014/89-1	May 17/90	Employee Status; Order	No
T/0014/89-2	Sept. 17/90	Allowed	Yes
T/0018/89	May 16/90	Unfair Labour Practice; Preliminary	Yes
T/0030/89 - see T/0001/89			
T/0048/89-1	Feb. 19/90	Unfair Labour Practice; Interim	Yes
T/0048/89-2	Mar. 19/90	Unfair Labour Practice; Dismissed; Employee Status; Allowed	Yes
T/0055/89	May 29/90	Unfair Labour Practice; Allowed	Yes
T/0057/89	Sept. 10/90	Duty of Fair Representation; Dismissed	Yes








File No.	Date	Type and Disposition	Indexed
T/0060/89-1	July 9/90	Certification; Order	No
T/0060/89-2	Sept. 28/90	Vote Ordered	Yes
T/0063/89	Nov. 1/91	Unfair Labour Practice; Allowed	Yes
T/0067/89-1	May 13/91	Employee Status; Preliminary	Yes
T/0067/89-2	Dec. 9/91	Employee Status; Allowed	Yes





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Crown Employees Bargaining Act  
R.S.O. 1980, C. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

BETWEEN:

James Glenny	T/0001/89
- and -	Complainant
Ontario Public Service Employees Union, Larry Rose William Jobe & Robert Wilson	
	Respondents
Jack Mills	T/0002/89
- and -	Complainant
James Clancy	Respondent
George MacLellan	T/0007/89
- and -	Complainant
James Clancy & Larry Rose	Respondents
James Glenny	T/0030/89
- and -	Complainant
James Clancy & Don Ball	Respondents

Before:

J.H. Devlin	Vice Chairperson
K. McDonald	Member
C. Boettcher	Member

For the Complainants:

Harry Kopyto
Legal Agent

For the Respondents:

Ian Roland
Counsel
Gowling, Strathy & Henderson
Barristers and Solicitors

A hearing in this matter was held on February 21, 1990 and written submissions were received on March 30, 1990.





This matter involves a number of complaints in which it is alleged that the Union and certain named respondents who hold office with the Union have breached sections 29(3) and 30 of the Crown Employees Collective Bargaining Act. These sections are as follows:

29.-(3) No person or employee organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of an employee organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

30. An employee organization shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees, whether members of the employee organization or not.

At the outset of the hearing, Mr. Kopyto who appeared on behalf of the Complainants, took the position that the Tribunal was obliged to keep a verbatim record of its proceedings and that it was without jurisdiction to proceed in the absence of such a record. Alternatively, Mr. Kopyto requested that he be permitted to record the proceedings. In support of this latter request, he submitted that a party is entitled to make an audio recording of court proceedings as well as proceedings before bodies such as the Discipline Committee of the Law Society of Upper Canada and the Board of Examiners of Physiotherapy.

It was the submission of Mr. Roland, on behalf of the Respondents, that apart from the requirement to give the parties





full opportunity to present evidence and argument, the Tribunal has the authority to determine its own practice and procedure and this does not impose an obligation to keep a verbatim record of its proceedings. In this regard, Mr. Roland pointed out that the Canada Labour Relations Board, which has similar authority over its own procedure, has no obligation to maintain such a record: Re Grain Handlers Union No. 1 [1977], 16 N.R. 539 (Fed. C.A.) and Canadian Merchants Service Guild and Canadian Pacific Limited [1980], 3 CAN L.R.B.R. 87 (Dorsey). Recently, an arbitrator also rejected the Union's request to have a court reporter present to record the proceedings where this procedure was opposed by the Company: Re Stelco Inc., Hilton Works and United Steelworkers, Local 1005 (1988) 2 L.A.C.(4th) 219 (Haeffling).

Mr. Roland further submitted that the Tribunal ought to reject Mr. Kopyto's request to record the proceedings. In this regard, Mr. Roland proposed that we follow the practice of the Canada Labour Relations Board which declined to permit one party to make an audio recording of its proceedings because of the potential for abuse including the possibility that such a recording could be edited or used to assist in the production of written propaganda: Canadian Merchants Service Guild and Canadian Pacific Limited (supra). In Eastern Provincial Airways Ltd. v. Canada Labour Relations Board et al. [1983] 6 Admin L.R. 139 (Fed. C. A.). Mr. Roland also relied upon Re Health Labour Relations Association and Hospital Employees' Union, Local 180





(1984), 17 L.A.C.(3d) 443 (Peck) in which the arbitrator rejected the association's request to have a court reporter present to prepare an official transcript of the proceedings.

Although the Ontario Labour Relations Board permits verbatim recording of its proceedings, Mr. Roland submitted that this occurs only in lengthy and complex cases at the request of one party and on consent of the other party. In such circumstances, the party making the request is responsible for the cost of preparing the transcript and copies of the transcript must be provided to the other party and to the Board. The transcript, however, does not form part of the official record of the proceeding.

Finally, while acknowledging that in court proceedings, a solicitor or a party acting in person may make unobtrusive use of an audio recording device for the sole purpose of supplementing or replacing hand written notes, Mr. Roland contended that, in such cases, an official transcript also exists. That transcript, therefore, is available to ensure that the audio recording is not improperly edited and represented as a verbatim record of the proceedings. In the absence of such a transcript in Tribunal proceedings, Mr. Roland asked that we reject Mr. Kopyto's request to make use of an audio recording device.





As pointed out by the Mr. Roland, sections 38(13) and 43 of the Crown Employees Collective Bargaining Act provide that the Tribunal shall determine its own practice and procedure subject to the requirement that the parties be given full opportunity to present their evidence and make their submissions. On the basis of these sections, the Tribunal is satisfied that it has the discretion to determine whether or not to keep a verbatim record of its proceedings. There is no requirement either in the Act or in any other legislation which requires that such a record be maintained. On the contrary, section 20 of the Statutory Powers Procedure Act, which provides for the compiling of a record of any proceedings in which a hearing has been held, specifies that the record shall include "the transcript, if any, of the oral evidence given at the hearing". This provision, therefore, further supports the conclusion that while a record may be kept and a transcript prepared, there is no legal requirement to do so.

To date, Tribunal proceedings have not been routinely transcribed and, in our view, this is consistent with the purpose of the Tribunal which to provide a forum for the expeditious resolution of labour disputes within the Tribunal's jurisdiction. It is also intended that the Tribunal will be readily accessible to the parties without the attendant formality of a court proceeding. Not only does verbatim recording and transcription





involve considerable expense but, in our view, it would add an element of undue formality. Although there may be exceptional circumstances in which the Tribunal finds it appropriate to keep a verbatim record, no such circumstances are present in this case. Accordingly, the Tribunal will not undertake the verbatim recording of the hearing in this matter.

As to Mr. Kopyto's request to make an audio recording, we note that in court proceedings, the unobtrusive use of a recording device by a solicitor, a party acting in person or a journalist for the sole purpose of supplementing or replacing handwritten notes has been approved without the necessity of an application to the presiding judge. A recording made in these circumstances stands on no different footing than a party's handwritten notes and does not constitute an official record of the proceedings. On a similar basis, the Tribunal is prepared to permit Mr. Kopyto and Mr. Roland, if he so requests, to make use of a recording device. The use of such a device shall not be permitted to interfere with the conduct of the hearing and will not, therefore, hamper the Tribunal in fulfilling its mandate under the Crown Employees Collective Bargaining Act. The possibility that a recording made in these circumstances could be used for an improper purpose is a matter which can be dealt with by the Tribunal at the appropriate time. This is not, however, a sufficient basis for denying the request to make such a recording.





The hearing of the Complaints shall proceed in accordance with the directions contained herein.

DATED AT TORONTO, this 3rd day of July. 1990

John H. [illegible]  
Vice Chairperson

"K. McDonald"  
Member

"C. Boettcher"  
Member













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T/0001/89-2

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Crown Employees Bargaining Act  
R.S.O. 1980, C. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

BETWEEN:

T/0001/89

James Glenney

Complainant

- and -

Ontario Public Service Employees Union, Larry Rose  
William Jobe & Robert Wilson

Respondents

T/0002/89

Jack Mills

Complainant

- and -

James Clancy

Respondent

T/0007/89

George MacLellan

Complainant

- and -

James Clancy & Larry Rose

Respondents

T/0030/89

James Glenney

Complainant

- and -

James Clancy & Don Ball

Respondents

Before:

J.H. Devlin	Vice Chairperson
K. McDonald	Member
C. Boettcher	Member

For the Complainants:

Harry Kopyto  
Legal Agent

For the Respondents:

Ian Roland  
Counsel  
Gowling, Strathy & Henderson  
Barristers and Solicitors

Hearing:

October 10, 1990

This matter involves a number of similar complaints in which it is alleged that the Union and certain Union officers breached sections 29(3) and 30 of the Crown Employees Collective Bargaining Act.

The first day of hearing took place on February 21, 1990 at which time, the Tribunal heard submissions on a number of preliminary issues raised by Mr. Kopyto who appeared on behalf of the Complainants. In respect of one of those issues, the Tribunal rendered an interim decision dated June 26, 1990.

The hearing was scheduled to resume on Wednesday, October 10, 1990 and notice of hearing was sent to Mr. Kopyto and to each of the Complainants. The notice specified the date, time and location of the hearing and also contained a note to the following effect: "if you do not attend the hearing, the Tribunal may proceed in your absence and you will not be entitled to any further notice of the proceedings."

Despite the notice of hearing, neither Mr. Kopyto nor any of the Complainants attended the hearing on October 10, 1990, which was scheduled to begin at 10:00 a.m. They made no previous request for an adjournment, nor did they initiate any communication with the Tribunal to explain the reason for their absence. As a result of a telephone call placed to Mr. Kopyto at approximately 10:30 a.m. on the morning of October 10th, the


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Tribunal learned that Mr. Kopyto had not been contacted by the Complainants for sometime and that he did not intend to appear at the hearing on their behalf. In fact, he subsequently indicated that he was no longer representing the Complainants. Further unsuccessful attempts were made to contact the Complainants directly.

At approximately 11:00 a.m., Mr. Roland, who appeared on behalf of the Respondents, requested that the complaints be dismissed and, after hearing submissions from Mr. Roland, the Tribunal granted that request.

In dismissing the complaints, the Tribunal relied upon its earlier decision in another matter involving Mr. Glenny in James Glenny and the Crown in Right of Ontario (Ministry of Government Services) and William Jobe and Robert Wilson T/001/A/89. In that case, Mr. Glenny had also been previously represented by Mr. Kopyto and on the day scheduled for hearing, neither Mr. Kopyto nor Mr. Glenny appeared at the hearing. They had also made no request for an adjournment, nor did they communicate with the Tribunal to explain the reason for their absence. After an unsuccessful attempt was made to contact Mr. Glenny and after hearing submissions from counsel for the employer and the union, the Tribunal dismissed Mr. Glenny's complaint.



In this case, the Complainants were each given express notice of the hearing and advised of the potential consequences of their failure to appear. Mr. Glenny, in particular, was also the subject of the Tribunal's earlier decision and could have had no doubt as to the effect of his failure to attend the hearing.

In the result, given the Tribunal's earlier decision and the absence of any explanation from the Complainants for their failure to attend the hearing, the complaints are dismissed.

DATED AT TORONTO, this 7<sup>th</sup> day of November, 1990.

KATHA NELSON  
Vice Chairperson

"Carol Boettcher"  
Member

"Kathy McDonald"  
Member









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T/0005/89

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT  
R.S.O. 1980, C. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

Between:

OPSEU (Bruneau et al)

Complainant

- and -

The Crown in Right of Ontario  
(Ministry of Natural Resources)

Respondent

BEFORE:

J. H Devlin	Vice-Chairperson
M. Sullivan	Member
C. Boettcher	Member

FOR THE  
COMPLAINANT:

D. Wright  
Counsel  
Ryder, Whitaker, Wright  
& Chapman  
Barristers & Solicitors

FOR THE  
RESPONDENT:

C. Riggs  
Counsel  
Hicks Morley Hamilton  
Stewart & Storie  
Barristers & Solicitors

HEARING:

July 21, 1989  
May 10, 1990

This matter came before the Tribunal as a result of a number of grievances which were filed by unclassified, seasonal employees of the Ministry. In these grievances, it was claimed that the grievors had been improperly laid off or alternatively, not recalled to perform work which was being performed by junior employees. When the matter came before the Grievance Settlement Board, an issue was raised as to whether the employees performing the work were employees of the Ministry and, therefore, employees for purposes of the Crown Employees Collective Bargaining Act. This matter was referred to the Tribunal for determination.

The employees in question were hired to work on two projects which were the subject of tripartite agreements between the Federal Crown as represented by the Canada Employment and Immigration Commission ("Canada Employment"), the Provincial Crown as represented by the Ministry of Natural Resources ("the Ministry") and the Algoma Fish and Recreation Association ("Algoma"). Algoma is an Ontario company, the objects of which include the enhancement of outdoor recreation opportunities and helping to co-ordinate the orderly use of natural resources. The Company's main undertaking is a fish hatchery located outside Thessalon. Apart from persons hired to work on projects undertaken by Algoma from time to time, the Company is staffed by volunteers.



The projects, which were the subject of the tripartite agreements, were carried out in the fall of 1988 and were approved under a job creation program established pursuant to Section 38 of the Unemployment Insurance Act. In accordance with this Section, persons in receipt of unemployment insurance benefits are eligible to work on approved projects and during the period of employment, they are paid enhanced benefits.

The first of the two tripartite agreements dealt with a stand improvement project which involved the pruning and thinning of white pine and white spruce located in the Kirkwood Management Unit, within the Ministry's Blind River District. The second of the two agreements dealt with a Geographical Information System ("G.I.S.") mapping project which involved drawing maps suitable for computer input and storage. This work was to be performed in the Ministry's Thessalon office which is also located in the Blind River District.

The evidence indicates that the projects in question were initiated as a result of a conversation between Gary MacMillan, a volunteer with Algoma, and the Federal Member of Parliament for the area who advised Mr. Macmillan that funds were available for job creation projects pursuant to Section 38 of the Unemployment Insurance Act. As a result, Mr. MacMillan approached Keith Hoback, a Resource Technician Senior I ("RTS I") employed by the Ministry in the Kirkwood Management Unit. Mr.

Hoback testified that within the Unit, Ministry staff invariably have a "wish list" of projects, or in other words, a list of projects they wish to undertake but for which they have not received funding approval. Repeated attempts are evidently made to obtain funding from the Ministry for such projects but in the event funding is not forthcoming, Ministry staff may explore the possibility of having the work done pursuant to Section 38 of the Unemployment Insurance Act. In fact, since the early 1980's, a number of projects have been completed by this means.

In this case, Mr. MacMillan reviewed the "wish list" with Mr. Hoback and identified certain projects which would be of interest to Algoma. Mr. MacMillan then approached members of the Ministry's District staff and obtained approval for the projects. The amount of work to be performed and the duration of each project were then agreed upon by Canada Employment and the Ministry. Thereafter, Mr. Macmillan negotiated with Canada Employment as to the number of employees required and the amount of their remuneration.

The agreements in issue were dated July 21, 1988 and the parties are described throughout as "Canada", "Ontario" and the "Project Sponsor" (Algoma). The responsibilities of the parties as well as the general provisions which are common to both agreements are as follows:

- PROJECT SPONSOR'S RESPONSIBILITIES
- 1(a) The PROJECT SPONSOR hereby undertakes and agrees to carry out the project described in Schedule "A" to this agreement in a manner acceptable to CANADA and ONTARIO, subject to the provisions of item 2 in this agreement.
  - (b) Those persons hired by or on behalf of the project are the employees solely of the PROJECT SPONSOR.
  - (c) Nothing in this agreement shall be deemed to authorize the PROJECT SPONSOR to contract for or incur any obligation on behalf of ONTARIO and CANADA.
  - (d) The PROJECT SPONSOR shall be solely responsible for an shall indemnify and hold CANADA and ONTARIO harmless and free from any and all losses, expenses, damages, demands, and claims that are sustained in excess of the third party liability insurance provided by the Federal government and arising out of or in connection with injuries, including death, or damages to any and all persons and to property in any way sustained or alleged to have been sustained in connection with or by reason of the performance of the project.
  - (e) This agreement may not be assigned by the PROJECT SPONSOR without the written approval of CANADA and ONTARIO.
  - (f) Where the project offers its services to both French and English speaking people the PROJECT SPONSOR shall ensure, to that extent that it is feasible to do so, that those services are available in both official languages.
  - (g) With respect to supplementary payments under RSWP [Resource Sector Work Program], project participants will be required to sign supplementary employment agreements with the PROJECT SPONSOR in accordance with Schedule "B", which is attached hereto and forms part of this agreement, and the PROJECT SPONSOR will be responsible for the completion of such supplementary employment agreements. The PROJECT SPONSOR will also ensure the issuance of supplementary payment cheques in accordance with RSWP provisions for Ontario program funding, which are attached hereto as Schedule "C" and form part of this agreement.



- (h) The PROJECT SPONSOR agrees that in order to comply with the requirements of Schedule "C", arrangements will be made with the Ministry of Natural Resources to have invoices prepared and submitted to the appropriate District Manager or Regional Director of the Ministry of National Resources bi-weekly, or, in the alternative, on a regular basis as agreed upon by the PROJECT SPONSOR and the MNR District/Regional office and in accordance with the amounts specified in Schedule "A" hereto. Invoices shall contain an itemized listing of:
  - (a) participants and amounts of top-up payments including 4% vacation allowance,
  - (b) sponsor or employee owned equipment charges being reimbursed by ONTARIO,
  - (c) sponsor or employee rented equipment charges being reimbursed by ONTARIO,
  - (d) other allowable expenses.
- (i) In the event payments made to the PROJECT SPONSOR exceed the amounts for which the PROJECT SPONSOR is properly entitled, any such overpayment shall be payable forthwith to ONTARIO upon receipt of notice thereof, and such overpayment shall be deemed to be a debt due to ONTARIO and may be recoverable in a court of competent jurisdiction.
- (j) The Federal Government will provide third party liability insurance for all RSWP projects, up to \$1.0 million per incident. Additional third party liability insurance as deemed necessary, must be provided by the PROJECT SPONSOR. The Federal Government's insurance policy comes into effect once the sponsor's insurance, if provided, has been exhausted. If the PROJECT SPONSOR does not provide third party liability insurance, the Federal Government's insurance comes into effect immediately.

PROJECT SPONSOR'S 2.  
AND  
ONTARIO'S  
RESPONSIBILITIES

Where the PROJECT SPONSOR and Ontario deem it appropriate to assign specific duties to ONTARIO the parties agree as follows:

- (a) The project and all persons employed thereon shall be at all times under the direct supervision, management and control of the PROJECT SPONSOR . . .

- (b) PROJECT SPONSOR . . . shall set up and maintain such books and records as are necessary for the proper financial management of the project, including; (a) a record of the names and addresses and duties of each employee, their wage rate, the amount of wages actually paid and the hours worked daily by each, on the form hereto attached as schedule "D", (b) a record of all expenditures together with supporting documentation such as vouchers, receipts and cancelled cheques.
  - (c) PROJECT SPONSOR . . . shall make the books and records of financial management of the project available to CANADA at all reasonable times for inspection, audit and, if necessary, copying and shall provide proper facilities for such inspection, and audit as well as any further information that may be required with reference to such books and records.
  - (d) PROJECT SPONSOR . . . shall complete the Final Project Completion Report Schedules "E" and "E-1" attached hereto, within 30 days of project termination.
  - (e) PROJECT SPONSOR . . . shall countersign the bi-weekly report card to be submitted to CANADA by each unemployment insurance claimant employed on the project and shall indicate on the report card all absences for illness or injury, any unauthorized time off, and all absences of 5 or more consecutive days.
  - (f) PROJECT SPONSOR . . . shall be responsible for ensuring the issuance of supplementary payment cheques in accordance with RSWP provisions which are hereto attached as Schedule "B".
  - (g) All payments required by law to be made by an employer including Income Tax, Canada Pension and holiday pay shall be the sole and absolute responsibility of PROJECT SPONSOR . . . depending on source of contributions to wage top-up, if any.
3. CANADA hereby undertakes and agrees to pay benefits in accordance with S.38 of the Unemployment Insurance Act, 1971 and regulations thereunder to claimants employed on the project which CANADA hereby approves for the purposes of S.38 of the Unemployment Insurance Act, 1971 as described in Schedule "A" hereto.

4. CANADA shall make a contribution not exceeding the amount referred to in Schedule "A" in respect to those other costs identified therein and which CANADA in its absolute discretion considers necessary for the efficient management of the project and the attainment of the project objectives.
5. ONTARIO shall provide Workers' Compensation Board Insurance for all project participants and any liability for payment of settlements to employees injured on RSWP projects as awarded by the Workers' Compensation Board, shall be the responsibility of Ontario.
6. ONTARIO and the PROJECT SPONSOR shall ensure that the project is operated in compliance with all laws, by-laws and regulations and such permits, licenses, consents and other authorizations as may be required are obtained prior to the commencement of any activity.
7. The project shall be carried out within the territorial limits of Ontario.
8. The services and facilities of the Canada Employment Centre must be used for enlisting and referring project participants, it being understood that only those persons who qualify to receive unemployment insurance may be enlisted, and all project participants will be required to sign a memorandum of understanding.
9. Project participants shall be permitted, during normal working hours, to attend interviews relating to more permanent employment, subject only to the need to give the supervisor reasonable notice of the participant's absence from work for the interview, and where requested, proof of attendance at the interview.
10. If, at any time, in the opinion of CANADA and ONTARIO, the PROJECT SPONSOR has failed to carry out the project in accordance with any of the covenants or undertakings contained herein, CANADA and ONTARIO may terminate the agreement by giving written notice thereof.
11. This agreement may be amended by mutual written consent of the parties.



12. All parties will assist in and facilitate the evaluation of the project.
13. The PROJECT SPONSOR must submit to CANADA and ONTARIO any proposed publication related to the project, and, when required by CANADA or ONTARIO, acknowledge CANADA's and ONTARIO's financial contributions to the project.
14. It is further understood by the representatives of the PROJECT SPONSOR that the person or persons signing this agreement for a PROJECT SPONSOR which is not a legally incorporated body or registered partnership hereby undertakes and agrees to be personally, jointly and severally liable for any and all obligations assumed by the PROJECT SPONSOR under this agreement and for any future debt due to CANADA or ONTARIO by reason of this agreement.

As a term of the agreements, the Ministry and Algoma were also required to certify that the projects would not duplicate or compete with existing services or displace work normally performed either by volunteers or by existing employees. These parties were further required to certify that the projects would not have been undertaken at that time as a result of any other private or public funding.

In the agreement relating to the stand improvement project, Keith Hoback was designated as the contact person for the Ministry and Don Hoyle, for Algoma. The agreement provided that the work was to be performed over a period of eleven weeks which ran from mid-October to mid-December, 1988. The personnel required for the project consisted of one supervisor, two crew bosses and nine employees. By way of expertise, Algoma was responsible for providing some 60 hours of supervision while the



Ministry was to provide one RTS I and one Resource Technician 3 ("RT 3"). It was anticipated that each of these employees would spend approximately 100 hours on the project. The Ministry was also to provide first aid instruction.

The equipment and materials for the stand improvement project included items such as axes, chain saws, gas, oil and paint and were to be provided by the Ministry.

The total estimated cost of the project was approximately \$52,400. Canada Employment's contribution was approximately \$44,700 which took the form of wages, or in other words, unemployment insurance benefits and top-up for non-supervisory personnel. The balance of approximately \$7,700 was to be contributed by the Ministry and consisted of the top-up of unemployment benefits for supervisory personnel, equipment, materials and the time of the RTS 1 and RT 3 as well as the cost of providing first aid instruction.

The agreement relating to the mapping project also provided that Keith Hoback and Don Hoyle would be the contact persons for the Ministry and Algoma, respectively. The work on this project was to be performed over the same eleven-week period and the personnel required for the project consisted of one supervisor and four map makers. By way of expertise, Algoma was to provide some 50 hours of supervision and the Ministry was a

provide two Foresters who were expected to spend a total of 150 hours on the project. As with the stand improvement project, the Ministry was also to provide first aid instruction.

The equipment required for the mapping project consisted of one light table to be provided by Algoma while drafting equipment, an additional light table and office space were to be provided by the Ministry. The Ministry was also responsible for providing the materials which included mylar and a map cabinet.

The total estimated cost of the mapping project was approximately \$28,840. Canada Employment's contribution was approximately \$17,760 and, again, this took the form of wages, consisting of enhanced unemployment insurance benefits. The Ministry's contribution was approximately \$10,580 which was made up of the top-up of benefits for the project supervisor, the provision of equipment and materials and the time of Ministry staff. Algoma's contribution was \$500 which was represented by the light table referred to previously.

Mary Anne McDonald, a volunteer with Algoma, acted as the project supervisor for the Mapping project and she was responsible for the hiring of staff for both projects. For this purpose, she placed an advertisement in the local newspaper which provided that Algoma had "Section 38" job opportunities

consisting of forestry and mapping work. Applicants were advised that to be eligible, they had to be in receipt of unemployment benefits. Interested persons were requested to telephone the number at the Algoma fish hatchery.

Ms. McDonald received a number of calls in response to the advertisement and testified that she advised applicants for the stand improvement project that they would be required to use an axe and operate a chain saw. She later conducted interviews and testified that she and Gary MacMillan hired all of the employees in question. In fact, there were actually more positions than there were applicants and so everyone who applied was hired. Among those hired was Steven Rouleau, who was to be the supervisor for the stand improvement project. Also hired were Linda Smith and Jeff Lester who were to act as crew bosses for this project. Ms. McDonald then submitted the names of all prospective employees to Canada Employment to ensure that they met the eligibility requirements.

On the first day of the projects, Ms. McDonald met with all employees and distributed to each a document entitled Algoma Fish and Recreation Association Ltd. Personnel Policies. This document outlined the terms and conditions of employment and dealt with topics such as hours of work, overtime, leaves of absence, discipline and discharge and health and safety. Ms. McDonald also arranged for each employee to sign a memorandum of

understanding which she submitted to Canada Employment to trigger the payment of enhanced unemployment benefits.

For employees on both projects, the Ministry provided a one day course on first aid which was conducted by Keith Hoback and Brian Maloney, an RT 3 also employed in the Ministry's Blind River District. For employees on the stand improvement project, the Ministry also arranged for a chain saw manufacturer to provide instruction on the use of chain saws. For employees on the mapping project, a member of the Ministry's Regional staff provided instruction on map making.

As indicated previously, the work on the stand improvement project involved the pruning and thinning of white pine and white spruce and there is no dispute that employees of the Ministry and seasonal employees, in particular, perform work of this nature. Steve Irving, a Resource Technician 2 ("RT 2") with the Ministry for approximately 8 years, testified that he has acted as a crew boss and supervised a field crew performing pruning and thinning work. As a crew boss, Mr. Irving was also responsible for ensuring that the crew complied with Ministry standards in terms of both quality and production.

In 1988, Mr. Irving began work in April and although his contract initially expired on August 30th, two extensions were granted with the result that he last performed work for the



Ministry in mid-October of 1988. Mr. Irving testified that he did not qualify for employment on the stand improvement project because he was still working for the Ministry when the project began and, therefore, was not in receipt of unemployment insurance benefits.

Evidence was also given by Ronald Nyman who worked for the Ministry as a seasonal employee for approximately 18 years. Mr. Nyman last worked as an employee in 1987 and currently performs work for the Ministry as an independent contractor. Mr. Nyman testified that as a seasonal employee, he, too, performed pruning and thinning work of the type performed on the stand improvement project. Mr. Nyman was also unable to qualify for work on this project.

The Ministry was evidently responsible for selecting the plots for the stand improvement project and on the first day of the project, Mr. Hoback attended at the site and explained to Mr. Rouleau the Ministry standards with which the crew was to comply. Thereafter, Mr. Rouleau and the crew bosses were responsible for providing day-to-day supervision. The crew bosses also kept attendance records and maintained daily logs of the work performed and of significant events such as injuries or equipment breakdowns. At the end of each week, the crew bosses also provided a report to the Ministry on production which was similar, although less detailed than the production reports

provided by the crew bosses supervising Ministry crews. At the end of each week, the crew bosses on the stand improvement project also turned in their attendance sheets to Ms. McDonald who arranged for delivery of the necessary documentation to Canada Employment to obtain the payment of enhanced benefits for the employees. Ms. McDonald invoiced the Ministry for the top-up for supervisory personnel as a result of which a cheque was issued by the Ministry to Algoma. Algoma, in turn, issued cheques to supervisory staff.

During the course of the stand improvement project, Mr. Hoback visited the site on two occasions. He testified that on the first occasion, he found that the work was not being performed to Ministry standards and, as a result, he spoke with Mr. Rouleau. Mr. Rouleau indicated that he would rectify the problem and when Mr. Hoback returned on second occasion, he found the work to be satisfactory.

Brian Eagelson, an RT 3 with the Ministry, testified that he also visited the site of the stand improvement project on three or four occasions and checked to ensure that the work was being performed to Ministry standards. In this regard, Mr. Eagelson testified that he exercised the same responsibility as he would have exercised in relation to a Ministry crew. Mr. Hoback testified, however, that Mr. Eagelson had no responsibility to check on the crews working on the stand

improvement project. Once the project was completed, Mr. Hoback, the Unit Forester and the Regional Silviculturalist returned to the site to conduct an audit and to ensure that the work had been performed to Ministry standards.

As to the mapping project, the evidence indicates that no similar work is performed by the Ministry in the Blind River District, but this work is performed in two other Districts as part of a pilot project. In the Kirkwood Management Unit, there is also a Technician who prepares rough drafts of maps based on information which he obtains from the field and from these drafts, mylar maps are created which are similar to those prepared by employees on the mapping project.

The work on the mapping project was also to be performed in accordance with Ministry guidelines and, for this purpose, the Ministry provided Ms. McDonald with a manual and a set of guidelines. A number of technical difficulties were encountered during the project, however, as a result of which Ms. McDonald consulted Mr. Hoback who contacted the Ministry's Regional staff. Mr. Hoback testified that in attempting to resolve these difficulties, he dealt directly with Ms. McDonald although on occasion, she was accompanied by the employee actually performing the work. Mr. Hoback estimated that during the first week, he spent approximately 30 hours on the mapping

project. During the second week, he spent approximately 20 hours and 12 to 16 hours thereafter.

It was the position of the Union that the work in question was integral to the Ministry's operation; that the work was performed for the Ministry's benefit, and that the Ministry dictated the manner and methods by which the work was performed. The Union contended that, in this respect, the Ministry exercised fundamental control over the project employees and asked the Tribunal to conclude that they were, in fact, employees of the Ministry.

It was the position of the Ministry that the true employer of the project employees was Algoma. The Ministry submitted that Algoma hired the employees, was responsible for imposing discipline and, in fact, exercised fundamental control over the employment relationship. In the result, the Ministry asked the Tribunal to find that the employees in question were not employees of the Ministry and, therefore, not employees for purposes of the Crown Employees Collective Bargaining Act.

The appropriate test to be applied to determine the identity of the employer was recently considered by the Tribunal in Ontario Public Service Employees Union and The Crown in Right of Ontario (Ministry of the Attorney General), File Nos. T/55/84



& T/65/84. There, the Tribunal adopted the comments of the Ontario Labour Relations Board in Sutton Place Hotel, [1980] OLRB Rep. Oct. 1538 as follows:

26. In York Condominium Corporation, [1977] OLRB Rep Oct. 645, the Board isolated seven factors to assist it in determining which of two entities is the employer for the purposes of The Labour Relations Act. At page 648 the Board listed the seven criteria:
- (1) The party exercising direction and control over the employees performing the work. ...
  - (2) The party bearing the burden of remuneration. ...
  - (3) The party imposing discipline. ...
  - (4) The party hiring the employees. ...
  - (5) The party with the authority to dismiss the employees. ...
  - (6) The party who is perceived to be the employer by the employees. ...
  - (7) The existence of an intention to create the relationship of employer and employees. ...

In York Condominium the Board did not attribute relative priorities to the various criteria but rather considered how each in turn applied to the particular facts before it and came to a decision based on the evidence.

- ...
41. A look at the jurisprudence highlights the wide variety of factual combination that present themselves in cases where the Board is called upon to identify the employer. It is apparent on review that no one of the seven criteria set out in York Condominium is determinative in all cases. In G.E.M. and Alwell Forming, for example, the company which hired the employees was not found by the Board to be the employer. In Ralston, Tower Company, Board of Internal Economy and Templet, on the other hand, the entity responsible for hiring was found to be the employer. In Ralston, Board of Internal Economy and G.E.M. the entity supervising the employees on a day-to-day basis was found to be the employer while in Tower Company and

Boeing of Canada it was not. In Templet and G.E.M. the company paying the wages was found to be the employer. In the Board of Internal Economy it was not. In Ralston and for some employees in Alwell Forming the group which actually bore the burden of remuneration was identified as the employer, and in Board of Internal Economy it was not. In G.E.M. and Alwell Forming the Board's finding was consistent with the perception of the parties. In Kent Line Ltd. this would appear not to have been the case.

...

43. The weight to be accorded the various indicia of employer status set out in York Condominium cannot be assigned in a vacuum. When one of the factors is combined with another in the hands of one company, the Board may conclude that they accurately identify the employer, though while standing alone or in some other combination they may not. The significance of each indicator can only be ascertained through an appreciation of how they all fit together within the facts of each case. It is only then that the Board can decide which factors in the particular case most accurately reflect and identify the employer for collective bargaining purposes.
44. A particularly important question answerable through an evaluation of the factors set out in York Condominium is who exercises fundamental control over the employees. In some cases control over hiring may reflect fundamental control. In other situations, reminiscent of a hiring hall, it may not. In some cases, day-to-day supervision may suggest fundamental control, in others, it may not. Similarly with the payment of wages: in the factual mix of some cases the payment of wages may, along with other factors, suggest who holds the fundamental control while in other cases it may be of minor significance. No single factor listed in York Condominium inevitably points to the possession of fundamental control. The Board's ultimate evaluation of who holds fundamental control in any particular fact situation, however, is generally the single most determinative question in identifying the employer. In a word, to find the seat of fundamental control is generally to find the employer for purposes of the Labour Relations Act.

In applying the criteria in York Condominium to this case, there was no dispute that employees on the stand

improvement and mapping projects were required to comply with Ministry standards in performing their work. At least on the stand improvement project, the Ministry also conducted periodic audits to ensure compliance with these standards. At the same time, the Ministry was not involved in the assignment of work to project employees nor did it play any role in their day-to-day supervision. Such supervision was provided by Mr. Rouleau and the crew bosses on the stand improvement project and by Ms. McDonald on the mapping project. In fact, it appears that there was little direct contact between Ministry personnel and the project employees in question. Mr. Hoback and Mr. Eagelson both testified that when they went to the site of the stand improvement project, they spoke with Mr. Rouleau rather than with the employees directly. Mr. Hoback also dealt primarily with Ms. McDonald in relation to difficulties encountered on the mapping project. It was the responsibility then of Mr. Rouleau and Ms. McDonald to direct the employees on a day-to-day basis and to ensure that they performed their work in an acceptable manner.

In this case, responsibility for remunerating the project employees rested with Canada Employment but it was not seriously suggested by either party that this factor alone should determine the identity of the employer.

Turning then to the hiring process, all of the employees in question were hired by Ms. McDonald and Mr.



MacMillan, both of whom are representatives of Algoma. Although there were actually more positions than there were applicants, there was no suggestion that had there been a larger number applicants anyone other than Ms. McDonald or Mr. MacMillan would have made the decision as to whom to hire. The responsibility for hiring the employees, therefore, rested with Algoma and not with the Ministry.

Although there was apparently no necessity to impose discipline on any of the project employees, the evidence indicates that these employees were governed by the Personnel Policies of Algoma and that Algoma assumed responsibility for matters of discipline and discharge. There was no evidence upon which the Tribunal could conclude that the Ministry purported to exercise any authority in this area.

Although, as pointed out by the Union, paragraph 10 of each of the tripartite agreements provided for a right of termination, this right did not rest exclusively with the Ministry. Paragraph 10 provided that "Canada" and "Ontario" could terminate the agreement if Algoma did not carry out the project in accordance with any of the covenants contained therein. This paragraph did not, however, address the right to deal with the shortcomings or deficiencies of individual employees. Once again, the evidence indicates that this was the responsibility of Algoma rather than the Ministry.



In this case, none of the employees in question was called to give evidence and, therefore, it is difficult for the Tribunal to determine which party was perceived to be the employer by the employees. As noted earlier, however, it appears that there was little direct contact between Ministry personnel and the employees in question. The tripartite agreements and the evidence of Ms. McDonald and Mr. Hoback indicate that both the Ministry and Algoma viewed the employees as employees of Algoma.

As pointed out in Sutton Place Hotel, no one factor in York Condominium is decisive in identifying the employer and instead the significance of each factor must be weighed in relation to the facts of the particular case. In this case, as noted, the work was to be performed in accordance with Ministry standards and, to this extent, the Ministry exercised control over the manner in which the work was performed. Algoma, however, was responsible for hiring the employees, for making work assignments, for providing day-to-day supervision and for matters of discipline and discharge. In these circumstances, it must be said that Algoma exercised fundamental control over a number of significant aspects of the employment relationship. Given this control on the part of Algoma, the Tribunal finds that Algoma rather than the Ministry was the employer of the project employees in question.

In the Tribunal's view, the circumstances in this case are distinguishable from those in Re Social Planning Council of Metropolitan Toronto and Canadian Union of Public Employees, Local 1777 (1980) 28 L.A.C.(2d) 134 (Knopf) which was relied upon by the Union. That case also involved government-funded job creation projects but there the Social Planning Council exercised a degree of fundamental control not exercised by the Ministry in this case.

In the result and, for the reasons set out, the Tribunal cannot conclude that the project employees in question were employees of the Ministry. Accordingly, the application is dismissed.

DATED AT TORONTO, this 23rd day of July, 1990.

James H. Dechko  
Vice Chairperson

"M. Sullivan"  
Member

"C. Boettcher"  
Member











Ontario Public Service  
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**T/13/89**

**IN A MATTER UNDER THE CROWN EMPLOYEES COLLECTIVE**

**BARGAINING ACT, R.S.O. 1980, c.108**

**ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL**

**Between:**

ONTARIO PUBLIC SERVICE EMPLOYEES UNION  
(the Applicant)

and

CROWN IN RIGHT OF ONTARIO  
(MINISTRY OF THE ATTORNEY GENERAL)  
(the Respondent)

and

ATCHISON & DENMAN COURT REPORTING SERVICES LTD.  
(the Third Party)

**RE: COURT REPORTING SERVICES FOR TORONTO TRUST TRIAL  
PRELIMINARY INQUIRY**

**BEFORE:**

Pamela C. Picher	Chair
W. Walsh	Member
J. McGivney	Member

**APPEARANCES:**

For the Applicant:	Elizabeth Lennon	Counsel
	Michael Wright	
	Cavaluzzo, Hayes & Lennon	
	Barristers & Solicitors	

For the Respondent:	Leslie McIntosh	Counsel
	Crown Law Office, Civil	
	Ministry of the Attorney General	

For the Third Party:	Carol Denman	
	Atchison & Denman Court Reporting	

Services Ltd.

A Hearing in this matter was held in Toronto on May 23, 1990

## DECISION

Pursuant to the provisions of section 40(1) of the Crown Employees Collective Bargaining Act, R.S.O. 1980, c. 108, the parties have jointly referred the following questions to the Tribunal:

1. Whether the persons performing court reporting services at the Toronto Trust Trial Preliminary Inquiry are "crown employees" notwithstanding that the Ministry has purported to contract out this function to Atchison & Denman Court Reporting Services, and
2. If the persons performing court reporting services are "crown employees," whether they are also public servants and, therefore, members of the OPSEU bargaining unit established by Regulation 232, section 11?

The parties agree that if the court reporters in issue are determined to be crown employees, then the answer to the second question concerning their status as public servants will be governed by the Tribunal's decision in OPSEU and Ontario Union of Court Reporters and the Crown in Right of Ontario (Ministry of the Attorney General), file nos.

T/14/89, T/64/84, T/18/86, T/55/84 & T/65/84, decisions dated May 17, 1990 and September 17 1990.

Section 1(1)(f) of the C.E.C.B.A. defines "employee" as follows:

- (f) "employee" means a Crown employee as defined in the Public Service Act but does not include,
  - (i) a member of the Ontario Provincial Police Force,
  - (ii) an employee of a college of applied arts and technology,
  - (iii) a person employed in a managerial or confidential capacity,
  - (iv) a person who is a member of the architectural, dental, engineering, legal or medical profession entitled to practise in Ontario and employed in a professional capacity,
  - (v) a student employed during the student's regular vacation period or on a co-operative educational training program,
  - (vi) a person not ordinarily required to work more than one-third of the normal period for persons performing similar work except where the person works on a regular and continuing basis,
  - (vii) a person engaged under contract in a professional or other special capacity, or for a project of a non-recurring kind, or for a project of a non-recurring kind, or on a temporary work assignment arranged by the Civil Service Commission in accordance with its program for providing temporary help,
  - (viii) a person engaged and employed outside Ontario,



- (ix) a person employed in the office of the Provincial Auditor, or
- (x) a person employed by or under the Tribunal or the Grievance Settlement Board;

The parties agree that any issue respecting exclusion from the status of "employee" under section 1(1)(f) of C.E.C.B.A. should be put to one side and not addressed by the Tribunal at this time.

**A. FACTS:**

The facts relevant to the resolution of the questions referred to the Tribunal are set out in the following Agreed Statement of Facts submitted by the parties:

**AGREED STATEMENT OF FACTS**

1. The Ministry of the Attorney General for the Province of Ontario (hereinafter the Ministry) has sole responsibility for the administration of justice in the province and has been granted the power to superintend all matters connected with the administration of Ontario Courts, including the District Court, Provincial Court (Civil

Division), Provincial Court (Criminal Division), and Provincial Court (Family Division).

Ministry of the Attorney General Act, R.S.O.  
1980, c.271, s.5

Courts of Justice Act, S.O. 1984, c. 11, s.91

2. The Attorney General has delegated Court administration to the Assistant Deputy Attorney General and Director of Courts Administration, Mr. Glenn H. Carter, and to the Deputy Director of Court Administration, Mr. Nestor Yurchuk. They provided Court reporting services for all the Courts together with Mr. T.F. Moran, Manager of Court Reports ("the Manager"). Mr. Moran has now retired and been replaced by Ms. Lesley Benderavage, who in turn has gone on maternity leave and been replaced by Mr. Chris Rutledge. The Provincial Court (Criminal Division) reporters are supervised by Mr. Wayne Robinson. The Manager bears direct responsibility for provision and supervision of Court Reporters' services.

3. Primarily, the obligation of a Court Reporter is two-fold:
  - 1) the making of the record in Court;
  - 2) the production of transcripts there from as required.

There is a continuing obligation on the reporter who made the record to produce the required transcripts to the limit of retention requirements.

4. Court Reporters are subject to the direction of the Chief Justice or Chief Judge of a Court, and to a presiding Judge or Master while the Court is in session. All reporters are required to adhere to such direction.

Courts of Justice Act, 1984, S.O. 1984, c.11, s.95

5. Freelance court reporters have already been found to be employees within the meaning of section 1(1)(f) of the Crown Employees Collective Bargaining Act in a decision by the Ontario Public Service Labour Relations Tribunal dated September 20, 1988 (File Nos. T/0064/84 and T/0018/86). The agreed statement of facts set out at pp. 4-11 of that decision are hereby incorporated by reference.
6. In an interim decision dated May 17, 1990, the Tribunal also found that freelance court reporters are public servants and therefore fall within the scope of OPSEU's bargaining unit described in section 11 of Regulation 232.
7. Court reporters employed by the Ministry are usually assigned by their supervisors to a particular judge for a period of one week. Any specific problems or requirements would be addressed to the reporter by the particular judge presiding. In addition, it is the judge who determines the time the case commences, and when breaks are taken.

8. Court reporters employed by the Ministry may also be assigned to special prosecutions which are of a lengthy duration of time. During these special prosecutions, court reporters do not undertake other assignments. Court reporters have been asked to provide daily transcripts the next morning during these cases. This practice is more frequently followed in District and Supreme Court. In Provincial Court (Criminal Division) reporters may rotate.
9. Many court reporters employed by the Ministry have purchased their own Computer Assisted Transcript (CAT) equipment. This equipment is kept at the courthouse, at the reporter's home, or both. This equipment enables the reporter to provide daily transcripts when requested to do so by the judge. The CAT system also enables reporters to produce a transcript of the day's proceedings on the same night. In certain cases in the past, daily transcripts have been requested by judges and counsel and provided by reporters employed by the Ministry. Court reporters who are assigned exclusively to the Provincial Court (Criminal Division) don't own this equipment that we are aware of. There are court reporters who move between all of the courts, including the Provincial Courts (Criminal Division) and they would be in the category of the "many court reporters" who do own this equipment.
10. All court reporters who own the CAT system can also conduct computer searches of the transcript to locate specific references.



11. In 1986-1987, 38 Criminal Code charges of fraud were laid, involving \$350M and 7 accused, arising out of the operation of the Seaway, Greymac and Crown Trust Companies. The Trust Companies case is the result of the most extensive police investigation undertaken in Canada to date. Accordingly, the Ministry of the Attorney General made a submission to Management Board of Cabinet to obtain extra resources to "meet the extraordinary demand this case will make on the administration of criminal justice". Included in the Management Board Submission is the cost of court reporting services.

Exhibit 9, memo to A. Wong from R.J. Henderson concerning  
MB-20 Submission dated October 6, 1987

12. In July, 1988 the Ministry of the Attorney General advertised in The [Toronto] Globe and Mail for submissions from organizations willing to provide Court Reporting Services for the "Trust Trial - Preliminary Hearing". The hearing was to take place in Toronto and was scheduled to begin early in September, 1988 and continue for a period of twelve to fifteen months.

Exhibit 1, Advertisement dated July 25, 1988 in The [Toronto] Globe and Mail

13. Interested organizations were able to request tender documents and specifications from the Ministry of Government Service, Public Tenders Office. The specifications set out the required experience, equipment, services, and other capabilities required from the successful applicant. The specifications include the following provisions: a requirement for daily attendance for reporters; an agreement by the winning tender to consent to a security check of its officers and staff before final selection and consent to further checks as required; the posting of a \$10,000 performance bond by the successful bidder; the successful bidder must supply resumes and references of all reporter personnel to be used on the hearing and substitutions are allowed only with the express permission of the Ministry; the Ministry reserves the right to terminate the contract, at its discretion, on 48 hours notice; the successful bidder must be available to work at the site of the hearing; the successful bidder must have substantial prior experience; the reporters must use the CAT system and daily transcripts are required the following morning and occasionally the same evening; the transcript must be available in both machine readable format and hard copy; the reporters should be able to conduct computer searches of the transcript to locate specific references; the successful bidder is to supply the CAT system; the Ministry will provide office facilities and a connector modem; and providing hard copies and disks of the transcripts is the responsibility of the successful bidder.

Exhibit 2, "Re: Court Reporting Services Trust Companies'  
Case", undated

14. By way of response to Appendix "A" of the Ministry's tender specifications, Atchison & Denman Court Reporting Services Ltd. submitted Appendix "A" as its tender submission.

Exhibit, Tender Submission titled Appendix "A", undated:

### **APPENDIX A**

#### **A. The Company**

- 1.1 Business name: Atchison & Denman Court Reporting Services Limited
- 1.2 Location: 85 Richmond Street West, Suite 720, Toronto, Ontario, M5H 2C9. The company is negotiating to relocate its offices at 145 King Street West, Toronto.
- 1.3 Number of reporting/transcribing staff: 16
- 1.4 Prior reporting experience of those personnel who would be assigned to the case:

Carol Denman, C.S.R., - Nine years experience as a Court Reporter with the Supreme Court of Ontario, with extensive criminal reporting experience, R. v Buxbaum, R. v McNamara. Three years experience as a Court Reporter and owner of Atchison & Denman.

Caron Tobias, C.S.R. - Ten years experience as a Court Reporter with the Supreme Court of New Brunswick. Two years experience as a Court Reporter with the Supreme Court of Ontario. Two years experience as a Court Reporter with Atchison & Denman covering various courts, hearings and discoveries.

Elizabeth Zyczynski, C.S.R. - Seven years experience as a Court Reporter with Canada

Immigration Centre. Eighteen months as a Court Reporter with Atchison & Denman, covering Small Claims Court, Provincial Court (Criminal & Family Division), OPP hearings, Institute of Chartered Accountants Discipline Committee, Ontario Labour Relations Board, discoveries, depositions and arbitrations.

Margaret Gazzard, Cindy Dike, Connie Budden, Kathryn Jump, Nancy Greggs - Each of these reporters have had two years or more experience as Court Reporters with Atchison & Denman, covering Provincial Courts (Criminal & Family Division), District Court, Small Claims Court, Inquests, OPP hearings, Child & Family Services, discoveries, arbitrations.

Nora Glass - Ten years experience as a Court Reporter with Peter McHugh, Special Examiner. Two years experience as a Court Reporter with Atchison & Denman covering a wide range of reporting functions.

Wendy Ogaki - one year experience as a Court Reporter with Canada Immigration Centre. Four years as a Court Reporter with Paul Rosenberger, Special Examiner's Office. Two years experience as a Court Reporter with Atchison and Denman, covering Small Claims Court, Provincial Court (Criminal and Family Division), OPP Hearings, discoveries, depositions and arbitrations.

Moira Freshwater - 12 months experience as a Court Reporter with Atchison and Denman covering a wide range of reporting functions, including Small Claims Court, discoveries, depositions and arbitrations.

- 1.5 **Arrangements for back up personnel** - It is the intent to have the above mentioned and other reporters on "stand-by" during hearing days in the event of illness, etc.
- 1.6 **History of the business, etc.** - Atchison's Court Reporting Services was incorporated in April



1985. In February 1986, Carol Denman became a fifty percent shareholder with Ross Atchison and the name changed to Atchison and Denman. Ross Atchison passed away in February 1987, and Carol Denman is now the sole shareholder of Atchison & Denman Court Reporting Services Limited. The Company provides reporting and transcribing functions for Examinations for Discovery, various courts under contract with the Attorney General of Ontario and the Solicitor General of Ontario, hearings, arbitrations, etc. The Company's major clients are those interested in Computer Aided Transcription, the provision of floppy disks, and litigation support.

Major reporting projects conducted using Computer Aided Transcription include:

The Alachlor Review Board, with  
The Hon. Judge B.B. Shapiro,  
December 1985 to December 1987,  
Daily Copy.

Ontario Task Force on Inflation  
Protection, August 1987, Daily  
Copy.

Ontario Securities Commission -  
re: International Larder -  
December 1986, January 1987,  
Daily Copy.

Institute of Chartered Accountants  
of Ontario, Discipline Committee  
re Seaway Trust, October -  
December, 1986, Daily Copy.

Law Society of Upper Canada,  
Discipline Committee hearings re  
Seaway Trust, August 1988.

Workers' Compensation Board  
Special Hearings, June 1987 and  
October 1987. Daily Copy.

International Inquiry into the  
Famine in the Ukraine, held in  
Brussels, May 1988.

Royal Commission into the Niagara  
Regional Police Force - June 1988  
and continuing.

International Arbitration re Air  
Canada v. Christian Rovsing, July  
1987 and April 1988.

**B. The Equipment and Facilities**

- 2.1 Type of Reporting and transcribing equipment -  
The Company owns both Xscribe and Baron  
CAT systems, IBM compatible computers and  
word processing software as well as Hewlett  
Packard LaserJet Printers.
- 2.2 Reproduction of the transcript will be done by  
Print Three located at 120 Adelaide Street West  
using Xerox 9500 copiers producing 15,000 copies  
per hour.
- 2.3 The CAT systems will be located on the hearing  
site. The photocopiers are located at 120  
Adelaide Street West.
- 2.4 Backup facilities - The Company owns several  
IBM compatible computers and two LaserJet  
printers in case of equipment failure. The  
company uses the "Fastback" software program to  
back up the hard disks. The Company has  
dedicated electrical lines for all computer  
equipment. Print Three has several backup Xerox  
photocopiers.
- 2.5 Software to be used - The Company uses Baron  
PC Software, Xcribe, Wordperfect 4.1, Multimate  
Advantage, Summation 11 and Fastback.

C. Terms

- 3.1 No daily attendance rate will be charged.
- 3.2 The charge for the transcript is \$3.00 per page for the original hard copy, plus 50 cents per page for each additional hard copy and disks in ASCII format.
- 3.3 There are no other charges.

15. On August 22, 1988, Ms. Carol Denman, President of Atchison & Denman, met with Mr. L. Tobias, Director of the Facilities and Special Court Services Branch of the Ministry of the Attorney General. This meeting led to a follow-up letter from Ms. Denman to Mr. Tobias regarding fees for transcripts ordered by Crown and defence counsel.

Exhibit 4, Letter to L. Tobias from C. Denman dated August 23, 1988:

. . .

Dear Mr. Tobias:

Further to our meeting yesterday, I am pleased to provide the following information concerning the Seaway Trust tender.

Firstly, you have my assurance that we will charge a reasonable fee for transcripts for defence counsel and any other interested parties. Our intention is to charge \$1.25 per page for an original defence copy, and 50 cents per page for each copy thereafter. Disks may be purchased without a hard copy at \$1.25. In addition to hard copy, disks may be purchased for 50 cents per page.

Secondly, you have requested additional information with respect to transcripts ordered by the Crown. Our tender provides for an original at \$3.00 per page and 50 cents per page for each copy thereafter. If the number of copies should exceed 10, we would charge 25 cents per page up to 20 copies, and thereafter, 15 cents per page.

If you require any further information, please do not hesitate to call me.

Yours very truly,

"Carol Denman" CSR  
President

16. On August 24, 1988, Ms. Denman wrote to Mr. Tobias concerning the reporting experience of Atchison & Denman. Ms. Denman provided Mr. Tobias with a list of contracts and contacts.

Exhibit 5, Letter to L. Tobias from C. Denman dated August 24, 1988:

...

Dear Mr. Tobias:

Further to your request for additional information concerning our reporting experience, I am pleased to submit the following list of contracts and contacts.

Our major contract was with the Alachlor Review Board which commenced December, 1985 and sat intermittently until December 1986. In addition to daily copy reporting, we also provided computer disks in Ascii format to the Commission and to counsel for the applicant. Further, at the conclusion of the hearings, we provided office space to the Board and transcribing personnel for the preparation of the final report on



the Board's findings. I have enclosed a letter from The Honourable B. Barry Shapiro, Q.C., for your information.

In May of 1988 we were retained by the now Honourable Mr. Justice John Sopinka to report an International Inquiry into the Famine in the Ukraine (1933) held in Brussels. The Inquiry lasted six days in Brussels and will resume in New York City this fall. We provided transcripts to the Board Members and counsel on a fast copy basis. The contact person in Toronto is Ms. Alexandra Chyczi, Counsel to the Commission - 867-9600.

We provided daily copy and computer disks to The Ontario Task Force on Inflation Protection. The Task Force sat intermittently from June to August, 1987, and generated 1,065 pages of transcript. The contact person is Ms. Maureen Hay, Secretary to the Task Force, 963-0900.

From May to July, 1988, we were retained to provide four days of daily and fast copy transcripts to the Provincial Courts Committee chaired by Mr. Gordon Henderson, Q.C. The contract person in the Ministry of the Attorney General is Ms. Susan Morrison, Budget and Administrative Officer, Judicial Support Services - 965-8535.

From October 1986 to January 1987, daily copy transcript and computer disks were provided to the Institute of Chartered Accountants of Ontario, concerning the discipline hearings of those accountants involved in Seaway Trust. The hearings lasted fourteen days. The contact person is Mr. Brian Bellmore - 598-2323 or Mr. Robert Peck 595-1234.

Eleven days of daily copy was provided on an Arbitration re Mashon Development v. Standard Life, October 1987 to May 1987 - Mr. Gordon Henderson, Q.C. - (613) 232-1781.

An International Arbitration re Air Canada v. Christian Rovsing was conducted intermittently from July 1987 to April 1988, a total of either days daily copy - Mr. Gerald Ranking - 865-4419.

We have provided daily copy to The Federation of Women Teachers' Associations of Ontario at their Annual Meeting, which lasts four days each year. I have had this contract personally for 12 years and transferred it to Atchison &

Denman at the time of its incorporation - Ms. Doreen Hamill - 964-1232.

We are currently reporting a case for the Ontario Labour Relations Board which commenced in November 1987 and have completed 10 days of hearings on a daily and fast copy basis - Mr. Richard Charney - 868-3490.

We presently have a contract with the Niagara Regional Police Force Inquiry which commenced on June 28th, 1988 and is scheduled to resume on October 17, 1988. The contract is expected to last approximately eight months. We are providing same day transcript, computer disks and litigation support to the Commission - Mr. Tom Millar, Administrator - 965-2142.

We also provide reporters on an "as needed" basis to the following boards and commissions:

Child and Family Services Review Board,  
Ministry of Communication & Social Service -  
Fani Ben Harrats (965-1871).

Workers' Compensation Board, Andrew Emnink  
(927-4002).

Fruit and Vegetable Inspection Branch, Ministry  
of Agriculture and Food, Mr. Wayne Patterson  
965-1058.

The Law Society of Upper Canada, Discipline  
Committee - Ms. Ellie Rosen - 947-3357.

The Law Society of Upper Canada, Department  
of Education - Mr. Joel Kohm - 947-3416

The Institute of Chartered Accounts of Ontario,  
Discipline Committee - Mr. Peter Scholfield 962-  
1841.

Ministry of the Attorney General, District Court,  
Provincial Court and Small Claims Court - Mr.  
Tom Moran 965-2399.

The Metropolitan Toronto Police Force,  
Homicide Squad, Staff Sgt. Joe Cziraky - 324-  
6150.

The Ministry of the Solicitor General, South  
Georgian Bay Region, J. Strathearn, M.D.,  
Regional Coroner - (705) 326-8400.

The Ontario Provincial Police Commission -  
Discipline Hearings, Inspector J. Mitchell - 965-  
2264.

The Canadian Society for the Advancement of  
Legal Technology - Ms. Elizabeth Ellis - 595-  
2310.

In addition, prior to my employment with the Supreme Court of Ontario, I worked with Angus Stonehouse and Co. as a reporter on several inquiries including: The Inquiry into Police Practices, The RCMP Inquiry, The Don Jail Inquiry, and boards including the Ontario Energy Board, the National Energy Board, Ontario Hydro Commission, the Workers' Compensation Board, Immigration Appeal Board and Electropower Planning Commission. In my capacity as a Supreme Court Reporter, I worked on the Sick Children's Inquiry and the LCBO Inquiry until tenders were let.

Atchison & Denman has a substantial examination for discovery and arbitration clientele and we would be happy to provide a contact list on request.

If you require any further information, please do not hesitate to call me.

Yours very truly,

"Carol Denman", CSR  
President

17. On August 26, 1988, Ms. Denman wrote to Mr. Tobias concerning transcript fees to counsel in the Trust Trial matter. Ms. Denman enclosed a proposed fee scale.

Exhibit 6, Letter to L. Tobias from C. Denman dated August 26, 1988:

...

Dear Mr. Tobias:

In response to your request for further detail concerning transcript fees to defence counsel in the Seaway Trust matter, I am pleased to submit the following proposal.

The attached scale is based on only two known factors: our tendered price to the Ministry at \$3.00 for the original and \$0.50 per copy, and the fact that there are six accused represented by counsel.

I have chosen this scale in an effort to ensure that the charges to defence counsel are the same as or as close as possible to those of the Crown. I have used the theory of each page of transcript having an average cost, rather than charging a premium to either side. As an example, if the Crown orders only one copy, the charge is \$3.00. If only one defence counsel orders one copy, the charge is also \$3.00. However, as you see from the attached chart, if the Crown orders 5 copies, the average cost based on our tender is \$1.00 per page. The cost to defence counsel for 5 copies is \$1.15 per page, and so on. In many cases, the cost to the Crown and to the defence for the same number of copies is identical.

Second copies to individual defence counsel would be charged at \$0.50 per page, in accordance with our proposal to the Crown, and disks would also be provided at \$0.50 per page.

Looking at the attached chart, if defence counsel should order additional copies, i.e. for a law clerk or junior, each additional copy would be \$.50 per page. Assuming each of six defence counsel ordered a second copy, each would pay \$1.00 for the first copy and \$.50 for their second copy. This would give a total



number of copies to all defence counsel of 12 at a cost of \$9.00 which is an average cost of \$0.75. The average cost to the Crown for 12 copies is \$0.67.

At the low end, assuming that only three defence counsel ordered a copy at \$1.35 each for a total of \$4.05 per page, and two of those three ordered second copies at \$0.50, i.e. \$5.05 per page, the average per page would be \$1.01 per page. If you look at the Crown's cost for five copies, the average cost is \$1.00 per page.

At the high end, assuming that all six defence counsel ordered 3 copies each, for a total of 18 copies, their cost would be \$1.00 for the first 6 and \$0.50 per page thereafter giving a total of \$12.00. This is an average of \$0.66. The average cost to the Crown is \$0.53.

In any event, according to my calculations, the difference in cost between the Crown and Defence, using any combination of copy orders would be a maximum of \$0.13 per page. Given that defence counsel are all billed individually and separate delivery arrangements have to be made for each, it seems reasonable that their average page rate would be a fraction higher in some cases.

If you have any question concerning these figures or require additional information, please do not hesitate to contact me.

Yours very truly,

"Carol Denman", CSR

18. On August 29, 1988, Ms. Dana Venner, Counsel at the Ministry, wrote to Mr. George Cowie, Manager of Administrative Service of the Ministry, concerning the tender bids for the Trust Trial matter. Ms. Venner stated her agreement with Mr. Cowie regarding the recommendation that Atchison & Denman be awarded the contract, and noted the factors leading to her decision. These factors included:

experience as reporters; experience using the search software; previous experience in the Trust Trial matter; personal knowledge that the "staff" of Atchison & Denman are professional, reliable, and knowledgeable; and the fact that Network Services lacked some of these qualities.

Exhibit 7, Letter to G. Cowie from D. Venner dated August 29, 1988:

August 29, 1988

Mr. George Cowie  
Manager Administrative Service  
Ministry of the Attorney General  
18 King Street East, 14th Floor  
Toronto, Ontario  
M5C 1C5

Dear Mr. Cowie:

Re: Reporting Services  
Trust Companies Prosecution

---

Thank you for providing me with the tender bids to provide court reporting services for the trust companies prosecution. I concur with your recommendation that the firm of Atchison and Denman be awarded the contract.

A review of all bids would show only Atchison and Denman and the Network Reporting Services firm to be competitive in terms of experience and price.

Between those two firms several factors weigh in favour of Atchison and Denman. First, the recommended firm is well established having been in existence for over three years. The principal reporter, Carol Denman, is not only an experienced reporter but has had some time to develop the business expertise required.

Secondly, the firm is well versed in using search software which will be a valuable service during the course of the preliminary.

Thirdly, the firm handled transcription for some of the earlier disciplinary hearings arising out of Seaway Trust and is therefore familiar with the subject area.

Fourthly, I have spoken to their staff in the past and have always found them to be professional, reliable and knowledgeable.

By contrast, Network Services is a relatively new firm of less than one year's duration. Although the individual staff have good reporting experience I would prefer to deal with an established firm. Although my exposure to Network is limited, on the one occasion I discussed the tender bid with the firm I was concerned that they lacked familiarity with the computer software being used on the project.

It would appear there is only a small difference in cost between the firms, Atchison and Denman are slightly more expensive for Crown copies although slightly less expensive when you consider the cost to the defence as well. The cost to the defence is an important factor in my view. The fee schedule cannot be structured, so as to place an inordinate burden on the defence nor should there be any suggestion that higher fees for the defence are being used to subsidize Crown transcripts.

I trust this is satisfactory.

Yours truly,

"Dana L. Venner"  
Counsel

19. On September 2, 1988, a purchase order was issued by the Ministry to Atchison & Denman for court reporting services.

Exhibit 8, "Ontario Government Purchasing Order" dated  
September 2, 1988

20. The preliminary inquiry in the Trust Companies case started as anticipated in September of 1988. However, it did not finish until May 11, 1990. The parties are currently awaiting the decision of the Court as to whether the accused will be committed for trial. The contract between Atchison & Denman and the Ministry was for the preliminary inquiry only.
21. Unlike Ministry court reporters, the court reporters on the Trust Trial did not invoice the Ministry directly and were not remunerated by the Ministry. The reporters on the Trust Trial were not regarded by the Ministry as their employees and therefore did not receive employment benefits. The Ministry also did not assign reporters for the Trust Trial.
22. Atchison & Denman Court Reporting Services Ltd. was incorporated in April of 1985. It has a reporting/transcribing staff of 16. Atchison & Denman continued to have other clients and projects while the Trust Companies case was going on. Some of the court reporters who worked on the Trust Companies case worked for other clients over the period of the Trust Companies preliminary inquiry.



23. Under the contract with the Ministry, Atchison & Denman is paid \$3 per page for the first copy of the transcript and \$0.50 per page for 6 additional copies, for a total of \$6.50 per page. There is no daily attendance rated charged.
24. In the letter dated August 26, 1988 (Exhibit 6), Ms. Denman assumed that "(a)t the low end" 3 defence counsel would order one transcript each and that "(a)t the high end ... all six defence counsel" would order 3 copies each. In fact, one of the accused pleaded guilty, one waived the preliminary inquiry and of the remaining, only one ordered one copy of the transcript. The result is that Atchison & Denman did not make the profit it anticipated on the contract. There was no change in the level of compensation paid by the Ministry to Atchison & Denman as a result of the reduced value of the contract.
25. Atchison & Denman invoiced the Ministry on a bi-weekly basis. It took about 6 to 8 weeks for the Ministry to pay each invoice. The Ministry did not deduct any amounts on account of income tax or benefits from the amounts paid to Atchison & Denman.
26. Carol Denman assigned the court reporters to the Trust Companies case. There were 4 court reporters assigned to the Trust Companies case. They were Carol Denman, Carol Tobias, Liz Zyczynski and Pauline Cziraky. The bulk of the reporting for the Trust Companies case was done by Ms. Pauline Cziraky. She is not one of the

reporters named in the Tender Submission. Her resume was not provided to the Ministry and the Ministry did not exercise the right in the Tender document to approve substitutions.

27. The court reporters for the Trust Companies case were paid by Atchison & Denman. They were paid the sum of \$6 per page of transcript. They were paid on a bi-weekly basis. Atchison & Denman does not withhold income tax from the amounts paid to the court reporters. Atchison & Denman considers the court reporters to be self-employed and contracted to Atchison & Denman.
28. The court reporters working on the Trust Companies case do not perceive the Ministry of the Attorney General to be their employer.
29. The Tender (Exhibit 2) for the Trust Companies case required that transcripts generally be ready by 9:00 a.m. on the following day and that occasionally transcripts be available the same evening.
30. It is necessary to use the Computer Assisted Transcript (CAT) system in order to produce transcripts the same day and in order to produce overnight transcripts for any extended length of time. Atchison & Denman owns the CAT equipment and software listed at pages 6 and 7 of the Tender Submission, which is Exhibit 3. Atchison & Denman did not use any Ministry equipment in order to carry out the

contract. Atchison & Denman generally produced transcripts by 7:00 p.m. the same evening.

31. It is not uncommon, and is becoming more frequent, for overnight transcripts to be required of Ministry staff reporters or "freelancers". Overnight transcripts have in the past not been required frequently in the Provincial Court (Criminal Division). Transcripts have never been requested for the same evening in Provincial Court (Criminal Division).
32. Most of the other court reporting done in the Provincial Court (Criminal Division) is done by the Stenomask System. The Stenomask equipment is owned by the Ministry. The Ministry has not purchased its own CAT system for its employees.
33. Mr. Robinson and Mr. Rutledge (previously Mr. Moran) oversee both the Ministry staff reporters and the "freelancers". Mr. Robinson and Mr. Rutledge are responsible for the hiring of Ministry court reporters and of "freelancers" and for assigning them to Courts, monitoring their reporting and transcribing, disciplining them and generally performing the functions of a supervisor with respect to them.
34. Neither Mr. Moran, Ms. Benderavage, Mr. Rutledge, nor Mr. Robinson assigned or monitored specific reporters to the Trust Companies case. It was Carol Denman who performed assignment and monitoring functions, subject to the law and the Tender

documents. As with any other court reporter, the presiding judge determines the days the court sits, and the hours it sits, included breaks; the reporters are required to attend on this schedule.

35. It is the joint assumption of the parties that if a reporter was unsatisfactory to the Ministry, the Ministry would advise Atchison & Denman Court Reporting Services Ltd. Ms. Denman would then either replace the reporter if the matter was serious enough or take other corrective action to meet the Ministry's concerns.

**B. POSITION OF OPSEU:**

In OPSEU and Ontario Union of Court Reporters and Ministry of the Attorney General, Re Freelance Court Reporters, (file nos T/64/84 and T/18/86), decision dated September 20, 1988 (hereinafter referred to as Re Freelance Court Reporters), the Tribunal found that three categories of freelance court reporters were employees of the Ministry. Counsel for OPSEU maintains that the relationship between the Ministry and the court reporters utilized by Atchison & Denman (hereinafter referred to as "T.T.T.P.I. [Toronto Trust Trial Preliminary Inquiry] court reporters") to fulfil its contract with the Ministry is, in all material respects, the same as the relationship between the Ministry and its freelance court reporters. In particular, counsel argues that the manner in which the work of the



freelance court reporters and the work of the T.T.T.P.I. court reporters is performed is the same, that the time at which it is performed is the same, that the type of location where it is performed is the same, that the nature of the direction and control from the Court while on the job is the same and that the impact of the Regulations over numerous aspects of their work is the same. On this basis, counsel maintains that the terms and conditions of employment are fundamentally the same for the Ministry's freelance court reporters and for the T.T.T.P.I. court reporters. Accordingly, counsel argues, the T.T.T.P.I. court reporters should be found to be "employees" of the Ministry.

Counsel asserts that the role of Atchison & Denman (hereinafter referred to as "A & D") is essentially that of an administrator acting on behalf of the Ministry, rather than that of an independent employer. Counsel describes A & D as a supplier of labour. She maintains that it is immaterial that the Ministry did not directly hire the T.T.T.P.I. court reporters while it does hire its freelance court reporters. Counsel argues that the more important consideration is that the Ministry held the same kind of control over the selection of the court reporters who would perform the T.T.T.P.I. work through its requirement in the tender documents for resumes and references. Counsel further emphasizes that the Ministry retained the right to expressly approve the substitution of any new court reporter. She maintains that it is immaterial that the Ministry never in fact exercised this right of approval. Nor in counsel's view does it matter that the CAT system equipment which was used by the T.T.T.P.I. court reporters was supplied by A & D. Counsel notes that some of the court reporters in Re Freelance Court Reporters own, and at times use, their own CAT system equipment.

If a T.T.T.P.I. court reporter was unsatisfactory to the Ministry, the Ministry would advise A & D and A & D would either replace the court reporter if the matter was serious enough or take corrective action to meet the Ministry's concerns. The Ministry also retained the right to cancel the contract on 48 hours notice. Counsel for OPSEU argues on the basis of these factors that the Ministry held the effective right of termination of the A & D court reporters.

Counsel further emphasizes that the tender documents were so explicit regarding the type of equipment that would be used, where the T.T.T.P.I. court reporters would work and when the transcripts would be made available that very little discretion was retained by the T.T.T.P.I. court reporters respecting how the work would be performed. Counsel argues that to the extent that the T.T.T.P.I. court reporters were doing the same work of producing transcripts as the court reporters in Re Freelance Court Reporters, they were integrated into the business of the Ministry.

Counsel has asked the Tribunal not to comment on the status of A & D and, instead, to focus only on whether the T.T.T.P.I. court reporters are employees of the Ministry. Counsel notes that although she views the role of A & D as a supplier of labour, it is really immaterial whether A & D runs its own business or is an agent of the Ministry. Counsel emphasizes that the relevant focus is the T.T.T.P.I. court reporters themselves and not the role of A & D.

In summary, counsel for OPSEU argues that the Ministry exercised fundamental control over the T.T.T.P.I. court reporters and that, accordingly, on the basis of the accepted tests for determining employee status, the T.T.T.P.I. court reporters are the employees of the Ministry.

**C. POSITION OF THE MINISTRY AND THE THIRD PARTY:**

Counsel for the Ministry disputes the characterization of A & D as a supplier of labour and argues that the contract between the Ministry and A & D was not a contract for labour but rather was a contract for (1) a product - in the form of transcripts, (2) equipment - in the form of the CAT system and (3) expertise - in the form of both computer and business skills and knowledge.

In asserting that the Ministry did not purchase the labour of the T.T.T.P.I. court reporters, counsel points to the fact that the Ministry did not pay them for their hours of work. The fee that the Ministry was charged under the contract between the Ministry and A & D was for the pages of the transcript. \$3.00 per page was payable for the first copy of the transcript and \$0.50 per page was payable for 6 additional copies, for a total of \$6.50 per page. Whether A & D sent one court reporter or six to the preliminary inquiry, the charge to the Ministry was the same. Counsel contrasts this situation with the Ministry's

freelance court reporters who were paid a per diem rate by the Ministry. Moreover, many of the Ministry's freelance court reporters are given a minimum 3-hour call in payment and can be asked by the Ministry to do clerical duties if there is insufficient court reporting work to be done during that 3 hour period. Unlike the situation with the freelance court reporters, the T.T.T.P.I. court reporters were not paid a daily attendance rate, did not invoice the Ministry and were not remunerated directly by the Ministry. The Ministry had nothing whatever to do with the remuneration received by the T.T.T.P.I. court reporters. Their remuneration was controlled by A & D.

To further emphasize that the Ministry was contracting for more than the supply of labour in its contract with A & D, counsel for the Ministry stressed that the Ministry utilized the business and computer expertise of A & D as well as its equipment. In the Ministry's letter endorsing the A & D bid, the Ministry commented that A & D had "the business expertise required" and that it was "well versed in using search software which [would] be a valuable service during the course of the preliminary." The Ministry further noted in its endorsement letter the importance of a balanced transcript fee structure for the Crown and the defence in order to avoid any suggestion that higher fees for the defence were being charged to subsidize Crown transcripts. Counsel emphasizes that it was A & D, through its business expertise, and not the Ministry, which devised this balanced fee structure.

The Ministry's tender document required the use of the CAT system equipment so that the transcripts could be produced the following morning and occasionally the same



evening. Counsel emphasizes that A & D supplied its own CAT systems, IBM compatible computers, Laserjet printers, software program and photocopiers to perform the contract for the T.T.T.P.I. The T.T.T.P.I. court reporters used this equipment and not Ministry equipment.

Counsel argues that the T.T.T.P.I. court reporters were not integrated into the Ministry's business as evidenced by the fact that they did not work along side the Ministry's freelance court reporters. They were bought in to perform a special assignment. Counsel argues that the T.T.T.P.I. is distinct from the normal business of the Ministry in that it was the result of the most extensive police investigation undertaken in Canada to date and a matter for which the Ministry made a submission to Management Board of Cabinet to obtain extra resources to "meet the extraordinary demand this case [would] make on the administration of criminal justice." The submission for extra funds expressly included the projected costs of court reporting services.

Counsel further maintains that the T.T.T.P.I. was distinct from the usual business of the Ministry because the Ministry does not normally require overnight or same day transcripts. Prior to the T.T.T.P.I. it had never required them in the Provincial Court(Criminal Division). As noted, the Ministry itself does not own the CAT system equipment that is required to produce same day or overnight transcripts. Counsel argues that, accordingly, the Ministry required the skills and specialization offered by A & D to

meet the unusual demands of the T.T.T.P.I. and thus contracted out the work to meet its need.

Respecting day to day control over the work of the T.T.T.P.I. court reporters, counsel argues that while the contract between the Ministry and A & D set specifications for the product, i.e. the transcripts, it did not set requirements for the actual labour used to perform the job, such as the number of court reporters who would work on the T.T.T.P.I. or the number of hours they would work beyond the actual hearing. Counsel argues that A & D is fully independent from the Ministry and that it was A & D, not the Ministry, which exerted day-to-day control over the T.T.T.P.I. court reporters. It was A & D, not the Ministry, which assigned the work to the T.T.T.P.I. court reporters and monitored the quality of their product.

Counsel further emphasizes that, unlike the situation with the freelance court reporters, the Ministry had no involvement whatever in the training of the A & D court reporters. Counsel observes that although the Ministry retained the right to expressly approve the substitution of court reporters whose references and resumes were not included in A & D's original submission, it never exercised that right. Counsel considers this significant, particularly when the court reporter who performed the majority of the work on the project was a court reporter who was not referred to in the tender document and whose resume and references were never provided to the Ministry. Counsel asserts that it is not

the legal entitlements in the relationship as much as its actualities that are determinative in assessing the employee status of the court reporters.

In summary, counsel maintains that there is a fundamental difference between the relationship between the Ministry and the T.T.T.P.I. court reporters and the relationship between the Ministry and its freelance court reporters who were found by the Tribunal to be employees of the Ministry. Counsel argues that the Ministry does not exercise fundamental control over the T.T.T.P.I. court reporters and that, accordingly, they are not its employees.

**D. DECISION:**

Numerous means of distinguishing employees from independent contractors have been established in the jurisprudence. The main ones are set out below:

1. The Control test,
2. The Fourfold test: a)control, b)ownership of tools, c)chance of profit and d)risk of loss,
3. The Whose Business Is It test,
4. The Organization test,
5. The Statutory Purpose test, and
6. The Algonquin List.

The details of these tests have been fully canvassed by the Tribunal in Re OPSEU and the Crown in Right of Ontario (Ministry of the Attorney General), file nos T/55/84 and T/65/84, decision dated June 24, 1988 and need not be reviewed here. Moreover, to look at the situation from the perspective of determining the identity of the employer, the parties agree that the key indicator is the location of fundamental control (See Re Sutton Place Hotel, [1980] OLRB Rep (Oct) 1538 and Re Don Mills Foundation for Senior Citizens and SEIU, Local 204 (1984), 14 L.A.C.(3d) 385 (P. C. Picher).

Having carefully reviewed the facts and the submissions of the parties, the Tribunal is readily satisfied that the T.T.T.P.I. court reporters are not "employees" within the meaning of section 1(1)(f) of C.E.C.B.A. In reaching this determination the Tribunal places particular weight on the following conclusions:

1. The Ministry's contract with A & D is not a contract for the supply of labour but rather is a contract for a product (the transcripts), for the utilization of specialized computer equipment (the CAT system) and for A & D's computer and business expertise.
2. There is a fundamental difference between the relationship between the Ministry and its freelance court reporters who were found by the Tribunal to be "employees" within the meaning of C.E.C.B.A. and the relationship between the Ministry and the T.T.T.P.I. court reporters.



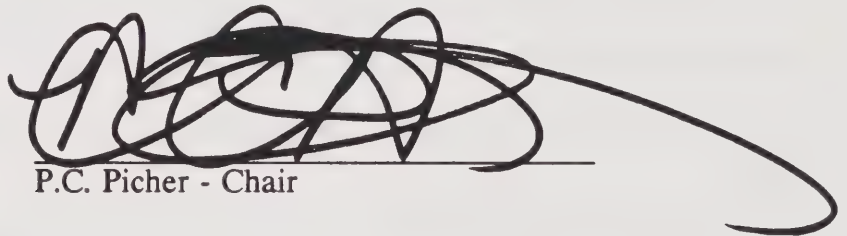
3. For example, but without being exhaustive, the Ministry did not negotiate a scheme of remuneration for the T.T.T.P.I. court reporters and, instead, negotiated a per transcript page rate with A & D itself. There was no daily attendance rate payable to the T.T.T.P.I. court reporters. In further contrast with the Ministry's freelance court reporters, the court reporters did not invoice the Ministry for their remuneration. Instead they were paid by A & D. The Ministry deducted no amount for income tax and paid no employment benefits. In short, the Ministry had nothing whatever to do with the remuneration received by the A & D court reporters.
4. Unlike the situation with the usual, day to day work of the Ministry's freelance court reporters, the Ministry did not supply the A & D court reporters with the equipment necessary to perform their work. The Ministry did not even own the specialized CAT system equipment that was required to produce the same day or overnight transcripts that it contracted for in its arrangement with A & D.
5. The T.T.T.P.I. court reporters did not intermingle with the Ministry's freelance court reporters. They were brought in through the Ministry's contract with A & D to perform work that was not usually performed by the Ministry's court reporters, that being, to produce same day or overnight transcripts in a Provincial Court criminal proceeding.

6. Unlike the situation with the Ministry's freelance court reporters, the hiring, training and direct monitoring of the work performed by the T.T.T.P.I. court reporters was not done by the Ministry. Instead the hiring and supervising of these court reporters was performed by A & D. Moreover, the Ministry itself had no control over, or input into, the work assignment of these court reporters or their hours of work beyond the hearing itself. The Ministry's control was satisfaction with the product that was produced by the T.T.T.P.I. court reporters. If the Ministry was displeased with the product, it's recourse was to advise A & D, not the T.T.T.P.I. court reporters. Dealing directly with the T.T.T.P.I. court reporters was A & D's responsibility. If the Ministry was still unsatisfied, its ultimate recourse was to cancel the contract.

In summary, the Ministry did not exercise fundamental control over the T.T.T.P.I. court reporters and they were not integrated into the Ministry's business. The Ministry did not supply the T.T.T.P.I. court reporters with the equipment necessary to perform their work, did not pay them a per diem rate, did not remunerate them directly, did not train them, hire them, assign them or supervise their work performance. The Ministry contracted with A & D for the production of transcripts at a per page rate, and in so doing utilized A & D's specialized equipment, computer and business expertise and the court reporters it provided. The court reporters A & D used to fulfil its contract with the Ministry for the T.T.T.P.I. never became employees of the Ministry.

When all of these factors are taken into account, it becomes readily apparent that the A & D court reporters carry a status which is distinctly different from the Ministry's freelance court reporters. Whether they are independent contractors or employees of A & D is a determination that need not be made by this Tribunal. The Tribunal is fully satisfied, however, that the T.T.T.P.I. court reporters are not "employees" within the meaning of section 1(1)(f) of C.E.C.B.A.

DATED in Toronto this 16th day of December, 1991.




P.C. Picher - Chair

I CONCUR



W. Walsh, Member

I CONCUR



J. McGivney, Member









Ontario Public Service

Labour  
Relations  
Tribunal

Fonction Publique de l'Ontario

Tribunal Administratif  
des Relations  
du Travail

T/0014/89-1

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8

T/14/89  
T/64/84, T/18/86,  
T55/84 & T/65/84

416/598-0688

**CROWN EMPLOYEES COLLECTIVE BARGAINING ACT, R.S.O. 1980, C.108**

**ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL**

**BETWEEN:** Ontario Public Service Employees Union  
(the Applicant #1)

**AND:** Ontario Union of Court Reporters  
(the Applicant #2)

**AND:** The Crown in the Right of Ontario  
(Ministry of the Attorney General  
(the Respondent)

**RE:** **FREELANCE COURT REPORTERS, COURT INTERPRETERS,  
CLERKS, BAILIFFS AND SMALL CLAIMS  
COURT EMPLOYEES**

**BEFORE:**  
  
Pamela C. Picher, Chair  
W. Walsh, Member  
John McGivney, Member

**APPEARANCES:**

**For the Applicant  
#1:** E. Shilton-Lennon, Counsel  
Cavalluzzo, Hayes & Lennon

**For the Applicant  
#2:** M. Horan - Counsel

**For the Respondent:** Leslie McIntosh  
Crown Law Office, Civil  
Ministry of the Attorney General

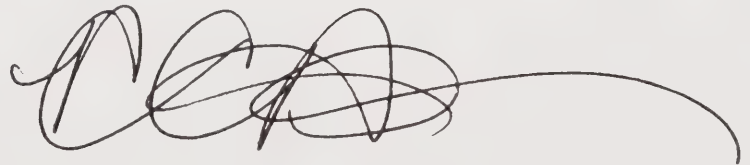
A hearing in this matter was held October 16, 1989 and supplementary written submissions were submitted dated October 25, November 1 and November 1, 1989.



## INTERIM DECISION

For reasons following in writing the Tribunal finds that the freelance court reporters are public servants within the meaning of section 1(1)(m) of the Crown Employees Collective Bargaining Act. They, therefore, fall within the scope of OPSEU's bargaining unit described in section 11 of Regulation 232 under C.E.C.B.A., R.R.O., 1980, (General), as amended.

Dated in Toronto this 17th day of May, 1990.

A handwritten signature in dark ink, consisting of several loops and a long horizontal stroke extending to the right.

Pamela C. Picher - Chair  
For the Tribunal











Ontario Public Service  
Labour  
Relations  
Tribunal

Fonction publique de l'Ontario  
Tribunal administratif  
des relations  
de travail

T/0014/89-2

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T/14/89, T/64/84, T/18/86, T/55/84, T/65/84

**CROWN EMPLOYEES COLLECTIVE BARGAINING ACT, R.S.O. 1980, C.108**

**ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL**

**Between:** Ontario Public Service Employees Union  
(the Applicant # 1 and Intervenor)

**AND:** Ontario Union of Court Reporters  
(the Applicant #2)

**AND:** The Crown in the Right of Ontario  
(Ministry of the Attorney General)  
(the Respondent)

**RE:** **FREELANCE COURT REPORTERS, COURT INTERPRETERS,  
CLERKS, BAILIFFS AND SMALL CLAIMS COURT  
EMPLOYEES**

**BEFORE:**

P. Picher	Chairperson
W. Walsh	Member
J. McGivney	Member

**FOR THE  
APPLICANT # 1:**

E. Shilton-Lennon  
Counsel  
Cavalluzzo, Hayes & Lennon  
Barristers & Solicitors

**FOR THE  
APPLICANT # 2:**

M. Horan  
Counsel

**FOR THE  
RESPONDENT:**

L. McIntosh  
Law Officer  
Crown Law Office - Civil  
Ministry of the Attorney General

A hearing in this matter was held October 16, 1989 and supplementary written submissions were submitted dated October 25, 1989, November 1, 1989 and November 1, 1989.



## DECISION

### I. INTRODUCTION:

In OPSEU and The Crown in Right of Ontario (Ministry of the Attorney General) and Ontario Union of Court Reporters (T/64/84 and T/18/86), decision dated September 20, 1988 (hereinafter referred to as "Re Court Reporters"), the Tribunal held that three groups of freelance court reporters are employees within the meaning of section 1(1)(f) the Crown Employees Collective Bargaining Act, R.S.O. 1980 c.108 (C.E.C.B.A.) and not independent contractors.

In OPSEU and The Crown in Right of Ontario (Ministry of the Attorney General) (T/55/84 and T/65/84), decision dated June 24, 1988 (hereinafter referred to as "Re Small Claims Court"), the Tribunal held that various groups of persons working in the Small Claims Courts are employees within the meaning of section 1(1)(f) of C.E.C.B.A. and not independent contractors: 1) the clerks and bailiffs of both the fee courts and salary courts, 2) the regular interpreters and 3) the casual interpreters. The Tribunal further found that the staff of the clerks and bailiffs are employees of the Crown within the meaning of section 1(1)(f) of C.E.C.B.A. and are not employees of the clerks and bailiffs.

During the course of attempting to implement these decisions, a further dispute arose between the parties which has been jointly referred to the Tribunal for final and binding determination. In the decisions outlined above, the Tribunal held that the persons in dispute are Crown employees within the meaning of section 1(1)(f) of C.E.C.B.A. The Tribunal made no comment about whether it further considered these employees to be public servants. The issue of whether they are public servants arises because the bargaining unit for which OPSEU holds exclusive bargaining rights is

described in section 11 of Regulation 232 under C.E.C.B.A., R.R.O. 1980 (General), as amended by O.Reg 252/85, as follows:

11. All public servants other than,

- (a) the persons who are not employees within the meaning of clause 1 (1)(f) of the Act; and
- (b) the persons in the classifications or positions set out in column 2 of Schedule 2,

are designated as a unit of employees that is an appropriate bargaining unit for collective bargaining purposes under the Act, and The Ontario Public Service Employees' Union is designated as the employee organization that shall have representation rights in relation to such bargaining unit. R.R.O. 1980, Reg. 232, s.11.

Subject to a potential issue under section 1(1)(f)(vi) of the C.E.C.B.A. which the parties have agreed to put aside at this point, it is common ground that the persons in issue are not "persons who are not employees within the meaning of clause 1(1)(f) of [C.E.C.B.A.]". Nor are they "persons in the classifications or positions set out in column 2 of Schedule 2". If they are public servants, they fall within the bargaining unit.

"Public servant" in C.E.C.B.A. is defined in section 1(1)(m) as a "public servant as defined in the Public Service Act ...". In the Public Service Act, R.S.O. 1980 c.418 (hereinafter referred to as the "P.S.A.") "public servant" is defined as follows in section 1(g):

1. In this Act:

...

- (g) "public servant" means a person appointed under this Act to the service of the Crown by the

Lieutenant Governor in Council, by the Commission or by a minister, and "public service" has a corresponding meaning;

[emphasis added]

It is the position of O.P.S.E.U. that the above-named groups of employees (freelance court reporters, court interpreters, clerks and bailiffs of the fee and salary courts and the staff of the clerks and bailiffs in the fee and salary courts) are or should be deemed to be public servants and, therefore, fall within OPSEU's bargaining unit. OPSEU maintains, on this basis, that it holds the exclusive bargaining rights for these employees now that the Tribunal has determined that they are Crown employees within the meaning of C.E.C.B.A.

The issue of whether the freelance court reporters fall within the OPSEU bargaining unit and are thus currently represented by OPSEU is a question which also arises in an application for certification filed by the Ontario Union of Court Reporters (O.U.C.R.) (file no. T/18/86). The parties agree that through this decision the Tribunal will determine the issue of the status of the freelance court reporters for T/18/86 as well.

The position of the Ministry and O.U.C.R., (in respect of the court reporters), is that notwithstanding that these persons have been found to be Crown employees, they are not public servants because they have not been appointed to their positions under the procedures set out in sections 6, 7 or 8 of the Public Service Act (P.S.A.). These parties argue that because they have not been appointed under the P.S.A. they are not public servants and thus do not form part of OPSEU's statutory bargaining unit.

The sections of the P.S.A. on which the Ministry and O.U.C.R. rely as establishing the exclusive means through which employees may be appointed "under this Act to the service of the Crown" within the meaning of the definition of "public servant" in section 1(g) of the P.S.A. are sections 3, 4, 6, 7 and 8, set out below:

3. (1) The Commission is responsible to the Minister for the administration of this Act.

...

4. The Commission shall,

- (a) evaluate and classify such position in the classified service and determine the qualifications therefor;
- (b) recommend to the Lieutenant Governor in Council the salary range for each classification, except a previously established classification for which a salary range is determined through bargaining pursuant to the Crown Employees Collective Bargaining Act;
- (c) recruit qualified persons for the civil service and establish lists of eligibles;
- (d) assign persons to positions in the classified service and specify the salaries payable;
- (e) determine perquisite charges for civil servants;
- (f) provide, assist in or co-ordinate staff development programs;
- (g) present annually through the Minister to the Lieutenant Governor in Council a report upon the performance of its duties during the preceding year, which report shall be laid before the Assembly if it is in session or, if not, at the next ensuing session.

...

6. (1) When a vacancy exists in the classified service, the deputy minister of the ministry in which the vacancy



exists shall nominate in writing from the list of eligibles of the Commission a person to fill the vacancy.

(2) The Commission shall appoint the person nominated under subsection (1) to a position on the probationary staff of the classified service for not more than one year at a time. R.S.O. 1980, c.418, s.6.

7. The Commission shall, if requested in writing by the deputy minister, recommend to the Lieutenant Governor in Council the appointment of a person on the probationary staff of the classified service to the regular staff of the classified service, and the recommendation shall be accompanied by the certificate of qualification and assignment of the Commission. R.S.O. 1980, c.418, s.7.

8. (1) A minister or any public servant who is designated in writing for the purpose by him may appoint for a period of not more than one year on the first appointment and for any period on any subsequent appointment a person to a position in the unclassified service in any Ministry over which he presides.

(2) Any appointment made by a designee under subsection (1) shall be deemed to have been made by his minister. R.S.O. 1980, c.418, s.8.

[emphasis added]

It is undisputed that in the ordinary course the procedures set out in sections 6 and 7 are followed for appointment to the classified service and that the procedures in section 8 are used for employees appointed to the unclassified service.

"Classified service" is defined in section 1(b) of the Public Service Act:

1. In this Act,

...

(b) "classified service" means the part of the public service to which civil servants are appointed;

[emphasis added]

"Unclassified service" is defined in section 1(i) of the Public Service Act:

1. In this Act,

...

- (i) "unclassified service" means the part of the public service that is composed of positions to which persons are appointed by a minister under this Act.

[emphasis added]

Section 6 of Regulation 881 under the Public Service Act, R.R.O. 1980, as amended, further defines the employees who fall within the unclassified service:

#### UNCLASSIFIED SERVICE

6. (1) The unclassified service consists of employees who are employed under individual contracts in which the terms of employment are set out and is divided into,
- (a) Group 1, consisting of employees who are employed,
- (i) on a project of a non-recurring kind,
  - (ii) in a professional or other special capacity,
  - (iii) on a temporary work assignment arranged by the commission in accordance with its program for providing temporary help,
  - (iv) for fewer than fourteen hours per week or fewer than nine full days in four consecutive weeks or on an irregular or on-call basis,
  - (v) during their regular school, college or university vacation

period or under a co-operative educational training program;

- (b) Group 2, consisting of employees who are employed on a project of a recurring kind,
  - (i) for fewer than twelve consecutive months and for fewer than,
    - (A) 36-1/4 hours per week where the position, if filled by a civil servant, would be classified as a position requiring 36-1/4 hours of work per week,
    - (B) 40 hours per week where the position, if filled by a civil servant, would be classified as a position requiring 40 hours of work per week.
  - (ii) for fewer than eight consecutive weeks per year where the contract of the employee provides that the employee is to work either 36-1/4 hours per week or 40 hours per week;
- (c) Group 3 consisting of employees appointed on a seasonal basis for a period of at least eight consecutive weeks but less than twelve consecutive months to an annually recurring position where the contract provides that the employee is to work either 36-1/4 hours per week or 40 hours per week. O. Reg. 24/86, s.3(1), part.

...

- (3) No person who occupies a position in the classified service shall be employed in the unclassified service, except with the approval of the Commission.
- (4) No person employed in the unclassified service shall supervise the work of persons employed in the classified service, except with the approval of the Commission. R.R.O. 1980, Reg. 881, s.6(3, 4).

...

[emphasis added]

At the time that the persons in question were initially employed by the Ministry of the Attorney General, no consideration was given to following the procedures for appointment pursuant to section 6, 7 or 8 of the P.S.A. because they were not believed to be employees of the Crown; they were thought to be independent contractors (in the case of the court reporters, court interpreters, clerks and bailiffs) or employees of the clerks and bailiffs (in the case of the staff of the Small Claims Court).

Sections of the Courts of Justice Act, R.S.O. 1980, c.261 (hereinafter referred to as the "C. of J. Act" ) further provide for the appointment of the employees involved in this matter. Sections 86 and 87 specifically speak to the appointment of clerks, bailiffs, and deputy clerks and bailiffs. Section 91 stipulates that the Attorney General shall superintend all matters connected with the administration of the courts and section 94 provides for the appointment under the P.S.A. of employees who are deemed necessary for the administration of the Courts. These sections read as follows:

#### OFFICERS

86. (1) There shall be such clerks for the Provincial Court (Criminal Division) and the Provincial Court (Family Division) as are considered necessary, appointed under the Public Service Act.

(2) Each clerk of the Provincial Court (Criminal Division) is a clerk of the Provincial Offences Court.

(3) Each clerk of the Provincial Court (Family Division) is the clerk of that court sitting as the Provincial Offences Court. 1984, c.11, s.86 (1-3).

(4) There shall be a clerk and one or more bailiffs for each division of the Provincial Court (Civil Division) who shall be appointed by the Lieutenant Governor in Council and, with the approval of the Attorney General,



every clerk and bailiff of the Provincial Court (Civil Division) in an area that is not designated under clause 87 (1)(g) may appoint in writing a deputy who may exercise and perform all the powers and duties of the clerk or bailiff. 1984, c.11, s.86 (4); 1984, c.64, s.5.

(5) The Lieutenant Governor in Council may appoint a referee for a division of the Provincial Court (Civil Division). 1984, c.11, s.86(5).

## REGULATIONS

87. (1) The Lieutenant Governor in Council may make regulations,

...

(g) providing for the retention of fees by clerks, bailiffs and referees of the Provincial Court (Civil Division) who are not civil servants under the Public Service Act and designating areas where clerks, bailiffs and referees of the Provincial Court (Civil Division) may be appointed to a position as a civil servant under that Act;

...

## COURTS ADMINISTRATION

91. The Attorney General shall superintend all matters connected with the administration of the courts, other than matters that are assigned by law to the judiciary. 1984, c.11, s.91.

94. Court administrators, court reporters, interpreters, translators and such other employees as are considered necessary for the administration of the Courts in Ontario may be appointed under the Public Service Act.

[emphasis added]

Section 3 of the Ministry of the Attorney General Act, R.S.O. 1980 c.271

(hereinafter referred to as the "Min. of the A.-G. Act", further provides for the

appointment under the P.S.A. of persons required for the proper conduct of the business of the Ministry. The business of the Attorney General includes, as set out in section 5, superintending all matters connected with the administration of justice in Ontario. Relevant portions of sections 2, 3 and 5 of the Min. of the A.-G. Act provide as follows:

2. (2) The Attorney General shall preside over and have charge of the Ministry. R.S.O. (1970, c.116, s.2(2); 1972, c.1 ss.1, 9(6).

...

3. (2) Such officers, clerks and servants may be appointed under the Public Service Act as are required from time to time for the proper conduct of the business of the Ministry. R.S.O. 1970, c.116, s.2(2); 1972, c.1,s.1.

...

5. The Attorney General,

...

- (b) shall see that the administration of public affairs is in accordance with the law;
- (c) shall superintend all matters connected with the administration of justice in Ontario;

[emphasis added]

## II. FACTS:

The parties submitted the following statement of Agreed Facts:

### A. PREAMBLE:

1. All of the employees involved in this application were found to be Crown employees by the Ontario Public Service Labour Relations Tribunal (the "Tribunal") in two previous decisions. On January 22, 1988, the Tribunal found that clerks, bailiffs and other staff of the Ontario Small Claims Courts, and court interpreters were employees within the meaning of section 1(1)(f) of the Crown Employees Collective Bargaining Act, R.S.O. 1980, c.108 (file numbers T/55/84 and T/65/84 respectively). On May 11, 1988, the Tribunal found that court reporters were also employees within the meaning of section 1(1)(f) (file number T/64/84).
2. The court reporters who are involved in this application perform duties, subject to the terms and conditions outlined in the following agreed statement of facts, identical to those performed by employees in classified civil service positions.
3. The court interpreters who are involved in this application perform duties, subject to the terms and conditions outlined in the following agreed statement of facts, identical to those performed by employees in classified civil service positions.
4. The Clerks, Bailiffs and their Deputies in the small claims courts are appointed by Order in Council.
5. There are no employees in the small claims courts in classified civil service positions.
6. Employees intended to be classified public servants (civil servants) are hired pursuant to s.4(1), 6 and 7 of the Public Service Act, R.S.O. 1980, c.418. Employees intended to be unclassified public servants are hired pursuant to contracts of employment in form similar to Exhibit 1.
7. The Public Service Act Contract of Employment (Exhibit #1) provides as follows:

RETURN ALL COPIES OF CONTRACT

TO HUMAN RESOURCES BRANCH FOR COUNTERSIGNING

PLEASE PRINT - NO CARBON REQUIRED

P-104



Ministry of  
the Attorney  
General

46299

**THE PUBLIC SERVICE ACT CONTRACT FOR EMPLOYMENT**  
UNCLASSIFIED STAFF - GROUP 1

**PART I**

<input type="radio"/> MR <input type="radio"/> MRS <input type="radio"/> MISS <input type="radio"/> MS		APPLICANT'S NAME	SURNAME	FIRST NAME	INITIALS
NUMBER AND STREET, CONCESSION, RURAL, ETC.			CITY OR TOWN	POSTAL CODE	
ARE YOU IN RECEIPT OF A PENSION OR AN ANNUITY FROM THE ONTARIO PUBLIC SERVICE SUPERANNUATION FUND? YES <input type="radio"/> NO <input type="radio"/>			DATE OF BIRTH	SOCIAL INSURANCE NUMBER	
ARE YOU IN RECEIPT OF A PENSION FROM THE CANADA PENSION PLAN? YES <input type="radio"/> NO <input type="radio"/>			ENTITLED TO WORK IN CANADA BY REASON OF:		
IF YES, INDICATE EFFECTIVE DATE			CANADIAN CITIZEN <input type="radio"/>	LANDED IMMIGRANT STATUS <input type="radio"/>	WORK PERMIT <input type="radio"/>

**PART II**

OFFICE	LOCATION	BR. OFFICE POS CODE
POSITION: COURT CONSTABLE AT THE RATE OF \$ _____ PER HOUR SHERIFF'S COURT DEPUTY AT THE RATE OF \$ _____ PER HOUR COURT REGISTRAR AT THE RATE OF \$ _____ PER HOUR		EFFECTIVE DATE EXPIRY DATE MAXIMUM HOURS

**PART III**

I, THE APPLICANT HEREBY ACCEPT THE ABOVE MENTIONED POSITION AND CERTIFY THAT I HAVE READ AND UNDERSTAND THE TERMS & CONDITIONS HEREIN CONTAINED.		INITIALS OF DIVISION/BRANCH HEAD/DESIGNEE
SIGNATURE OF APPLICANT		INITIALS
SIGNATURE OF SUPERVISOR		APPROVED BY 
TITLE		

**PART IV**

**OATH OF OFFICE AND SECRECY**

I, \_\_\_\_\_, DO SWEAR (OR SOLEMNLY AFFIRM) THAT I WILL FAITHFULLY DISCHARGE MY DUTIES AS A PUBLIC SERVANT AND WILL OBSERVE AND COMPLY WITH THE LAWS OF CANADA AND ONTARIO, AND, EXCEPT AS I MAY BE LEGALLY AUTHORIZED OR REQUIRED, I WILL NOT DISCLOSE OR GIVE TO ANY PERSON ANY INFORMATION OR DOCUMENT THAT COMES TO MY KNOWLEDGE OR POSSESSION BY REASON OF MY BEING A PUBLIC SERVANT. SO HELP ME GOD. (OMIT THIS IN AN AFFIRMATION)

SWORN BEFORE ME AT \_\_\_\_\_ OF \_\_\_\_\_ THE PROVINCE OF ONTARIO THIS \_\_\_\_\_ DAY OF \_\_\_\_\_ 19\_\_\_\_

SIGNED \_\_\_\_\_ DEPUTY ATTORNEY GENERAL OR HIS DESIGNEE

SIGNATURE \_\_\_\_\_ APPLICANT

**PART V**

SHADED AREA FOR HUMAN RESOURCES BRANCH USE ONLY

**TERMS AND CONDITIONS OF EMPLOYMENT**

- THE APPLICANT IS HEREBY APPOINTED TO THE UNCLASSIFIED STAFF PURSUANT TO SECTION 8 OF THE PUBLIC SERVICE ACT.
- THE WORK PERIOD AND HOURS OF WORK WILL BE DETERMINED BY THE EMPLOYEE'S SUPERVISOR, BUT A MINIMUM OF TWO (2) HOURS PAY IS GUARANTEED FOR ANY DAY ON WHICH THE EMPLOYEE IS REQUIRED TO REPORT FOR DUTY. THE EMPLOYEE WILL COMPLETE THE DAILY ATTENDANCE REGISTER PRESCRIBED BY THE MINISTRY.
- THE APPLICANT'S EMPLOYMENT UNDER THIS CONTRACT SHALL BE ON AN AS REQUIRED BASIS, AND SHALL NOT EXCEED THE MAXIMUM NUMBER OF HOURS SPECIFIED ABOVE, EXCLUDING OVERTIME AS DEFINED IN CLAUSE (D) BELOW.
- OVERTIME WILL BE PAID AT THE RATE OF TIME AND A HALF FOR ANY WORK PERFORMED IN EXCESS OF SEVEN AND ONE QUARTER (7 1/4) OR EIGHT (8) HOURS PER DAY, AS APPLICABLE, CALCULATED TO THE NEAREST HALF HOUR.
- VACATION PAY WILL BE 4% OF GROSS EARNINGS. THIS PAYMENT WILL BE ADDED TO YOUR BI-WEEKLY EARNINGS.
- STATUTORY HOLIDAY PAY WILL BE 4% OF GROSS EARNINGS NOT INCLUDING VACATION PAY. THIS PAYMENT WILL BE ADDED TO YOUR BI-WEEKLY EARNINGS.
- THE APPLICANT WILL BE ELIGIBLE, WHERE APPLICABLE, TO RECEIVE FEES AND EXPENSES AS SET FORTH IN THE REGULATIONS UNDER THE ADMINISTRATION OF JUSTICE ACT.
- BEREAVEMENT, JURY OR WITNESS DUTY LEAVE, IS PROVIDED FOR IN ACCORDANCE WITH THE WORKING CONDITIONS COLLECTIVE AGREEMENT.
- UNION DUES WILL BE DEDUCTED IN ACCORDANCE WITH THE W.C.C.A. (MEMBERSHIP IN THE OPSEU IS GRANTED ONLY ON APPLICATION BY THE EMPLOYEE TO THE OPSEU).
- OTHER CONDITIONS OR PROVISIONS IN ACCORDANCE WITH THE W.C.C.A. OR REGULATIONS UNDER THE PUBLIC SERVICE ACT AS APPLICABLE.
- THIS CONTRACT OF EMPLOYMENT MAY BE TERMINATED BY EITHER PARTY UPON GIVING ONE WEEK'S NOTICE OF SUCH INTENTION. OTHERWISE IT WILL EXPIRE ON THE DATE SPECIFIED ABOVE.
- THIS CONTRACT IS NOT BINDING UNLESS IT IS APPROVED BY THE ATTORNEY GENERAL OR HIS DESIGNEE.



8. The Public Service Contract of Employment is entered into by the employee. It then goes to a person in Personnel who is delegated in writing by the Minister to perform this function. That person checks things like the salary, hours of work and classification and approves the contract.
9. The contract as approved is initialled or signed off by that person in personnel. Other documentation is then created for payroll purposes and the documentation goes into the personnel file. Subsequently, the pink copy of the contract, as initialled, is returned to the employee.
10. At the time these persons were initially employed, no consideration was given to following the procedures in the Ministry of the Attorney General for appointment pursuant to section 8 of the Public Service Act because none of them were believed to be employees.
11. No additional steps have been taken since the Tribunal decision.
12. The Attorney General and the Deputy Minister are aware of the situation.
13. There is a process of restructuring of the courts that is going on. The first phase is scheduled for 1990. The Ministry contemplates that ultimately there will be two levels of courts: a Court of Appeal and an Ontario Court of Justice. It is contemplated that ultimately (in phase II) the Ontario Court of Justice will have three divisions: Criminal, Family and Civil. In the interim, in 1990 (phase I) there will be an Ontario Court of Justice but instead of dividing it by subject, it will be divided into two divisions: the General Division and the Provincial Division. The three subject matters of Criminal, Family and Civil will be divided along the traditional federal/provincial lines within those two divisions. Accordingly, there will be some criminal, family and civil at each level. Ultimately, when constitutional authority is obtained, the areas will be blended.
14. The following three sections set out the agreed facts for (A) court reporters, (B) court interpreters, and (C) small claims court employees:

B. THE COURT REPORTERS:

1. The Ministry of the Attorney General for the Province of Ontario (hereinafter the Ministry) has sole responsibility for the administration of justice in the province and has been granted the power to superintend all matters connected with the administration of Ontario Courts, including the District Court, Provincial Court (Civil Division), Provincial Court (Criminal Division), and Provincial Court (Family Division).

Ministry of the Attorney General Act,  
R.S.O. 1980, c.271, s.5

Courts of Justice Act, S.O. 1984, c.11,  
s.91

2. The Attorney General has delegated Court administration to the Assistant Deputy Attorney General and Director of Courts Administration, Mr. Glenn H. Carter, and to the Deputy Director of Court Administration, Mr. Nestor Yurchuk. Together, with Mr. T.F. Moran, Manager of Court Reports ("the Manager"), they provide Court reporting services for all the Courts. The Manager bears direct responsibility for provision and supervision of Court Reporters' services.
3. Ontario Courts utilize two types of Court Reporters: staff and freelance. There are approximately 749 reporters providing reporting services in the province, of which about 54 percent are freelance.
4. Many of the staff and freelance Court Reporters, and the vast majority of new Court Reporters of both types, are graduates of the Court Reporters course at George Brown College. That course was originally established at the request of the Ministry. The College receives ongoing input from the Ministry through an advisory board, which includes the Manager and Bill Nichols, supervisor of Court Reporters at the District Court in the Judicial District of York.
5. Appointments to staff Court Reporting positions are made as a result of competitions advertised in Topical Job Mart and/or local bulletin board circulation. Eligible candidates are interviewed by a panel, composed of the Manager and the Local Manager of Court reporting services (hereinafter the Local

Manager), usually the Local Register of the Supreme Court or the Provincial Court Administrator. Where there is a supervising Court Reporter, he/she replaces the Local Register of Court Administrator on the panel. After a reasonable probationary period under supervision, the reporter, if his/her performance proves satisfactory, will receive a regular appointment pursuant to the provisions of the Public Service Act, R.S.O. 1980, c.418. An appointment can be revoked and revocation will occur if the individual in question fails to meet the standards set by the Ministry.

Courts of Justice Act, 1984, S.O. 1984,  
c.11 s.94

6. Previously, the staff Court Reporters performed the vast majority of the Court reporting work required by the Ministry of the Attorney General. They were supplemented by a small group of freelance reporters who filled in while staff reporters were ill or on vacation or when jurisdictions had visiting judges and there were not enough staff reporters to spare. In more recent times, with the increase in the demand for Court services and the hiring restrictions that prevail in the Ministry, freelance reporters are being used extensively. They continue to fulfill their traditional role and, in addition, are being used as semi-permanent and permanent replacements when there has been an attrition of staff reporters [who] in the normal course are not being replaced, or where additional courtrooms have been made available through the expansion of the Court system and the staff reporter complement has not been correspondingly increased.
7. Initially, the Inspector of Legal Offices arranged the provision of freelance Court Reporters on an ad hoc basis. More recently, the Manager has been given that responsibility permanently.
8. Suitable candidates for freelance reporting are identified locally, either through advertising or through administration identification of potential candidates. Many of the freelance reporters are solicited by the Ministry from graduates of the course at George Brown College.
9. After preliminary testing, full training and evaluation is provided by the Ministry. At the conclusion of a three month to six month probationary period and successful completion of the reporters certification



program, a reporter is considered fully qualified to carry out all reporting functions. A list of qualified and preferred freelance reporters is maintained by the Manager. Qualified reporters are those who are approved for use by the Ministry and preferred reporters are those amongst the qualified reporters that the Ministry prefers to use.

10. When the Ministry is not approving of a Court Reporter or [his/] her actions, the following sanctions can be invoked:
  - a) assignment to less desirable reporter positions within the Court system (i.e. Landlord and Tenant Court);
  - b) removal from the preferred list;
  - c) removal from the qualified list;
  - d) failure to receive favourable consideration when being considered for a position as staff reporter;
  - e) admonition by the Court Administrator in respect of conduct or decorum.

Many freelance reporters depend on employment with the Ministry for their entire income. In addition the staff reporters positions offer the vast majority of permanent full time jobs available to Court Reporters. Therefore, the Ministry's sanctions are extremely effective.

11. Freelance reporters can be divided into three groups:
  - a) Freelance reporters that do work exclusively for the Ministry;
  - b) Freelance reporters that, with the permission of the Ministry, make their services available to clients other than the Ministry;
  - c) Freelance reporters that freely make their services available to other clients.

None of the reporters in groups 1) and 2) are contractually forbidden from working for employers other than the Ministry although they are expected to make themselves available to the Ministry in accordance with their personal commitment which may be 1, 2, 3, 4 or 5 days per week and only if the Ministry does not require their services are they at



liberty to make themselves available to others. It has been made clear to freelance reporters that failure to adhere to restrictions on their activity will cause the Ministry to invoke one of the sanctions listed in paragraph 10 above.

12. The freelance reporters that work exclusively for the Ministry are employed mainly at especially busy Metropolitan Courts (such as the District Court in the Judicial Districts of York and Peel). They are required to be at work for six hours per day, five days per week. They are relied on to supply Court Reporter services for particular courtrooms. Failure to attend on a regular basis and to perform properly will result in the invoking of one of the sanctions listed in paragraph 10 above.
13. Those freelance reporters that do not work exclusively for the Courts are commonly used in private practice for discoveries and by other statutory bodies. As a result of tax incentives, many such freelance reporters set up a home base reporting service and run it as a business enterprise.

Coroners Act, R.S.O. 1980, c.93, s.45(1)

Land Titles Act, R.S.O. 1980, c.230, s.19(1)

Municipal Act, R.S.O. 1980, c.302, s.2

Each freelance reporter has a home base or district and generally operates within a specific geographical area. Work performed on Examinations for Discovery usually takes place as part of the operation of the District Court House (except in busy metropolitan Courts described in paragraph 12 above). From time to time the manager of court reporters either directly or through the District Court Administrator requests freelance reporters to work under the jurisdiction of a statute e.g. Coroners Act. These services are performed either at the District Court House or at the freelance court reporters' home base depending upon a variety of factors including individual preference and available facilities.

14. Primarily, the obligation of a Court Reporter is two-fold:
  - a) the making of the record in Court;

- b) the production of transcripts therefrom as required.

There is a continuing obligation on the reporter who made the record to produce the required transcripts to the limit of retention requirements, regardless of employment status. All staff reporters are required to swear an oath of secrecy and an oath of allegiance pursuant to the provisions of the Public Service Act. In addition, all Court Reporters are required to swear a reporter's oath which is subsequently filed with the Court.

Public Service Act, R.S.O. 1980, c.418, s.10

Judicature Act, R.S.O. 1980, c.223, s.103

15. Court Reporters are subject to the direction of the Chief Justice or Chief Judge of a Court, and to a presiding Judge or Master while the Court is in session. Reporters are required to adhere to such direction.

Courts of Justice Act, 1984, S.O. 1984, c.11, s.95

16. In an effort to maintain a uniform standard of Court reporting, the Court Reporters' Association in co-operation with the Ministry publish a manual of Court Reporting. The Ministry has assumed responsibility for printing and circulating the manual to all Court Reporters province wide. The manual is a comprehensive guide to the Acts and Regulations governing Court reporting and is continually updated by revised pages and by directive memos issued from the Manager to Court Reporters in general.

Manual of Court Reporting (Exhibit 1)

A large percentage of freelance court reporters are members of the Court Reporters Association.

17. In the event that a freelance reporter fails to adhere to the requirements set out in paragraphs 14, 15 and 16, the Manager will invoke the appropriate sanction from among those listed in paragraph 10 above.
18. Freelance reporters are assigned by the Manager to a Local Manager in a given Court. Periodically the Manager will notify the Local Manager of a need for a Court Reporter in another Court. These notifications

are usually posted and a request is made by the Local Manager for a Court Reporter to go on assignment to another Court. Unlike staff reporters, freelance reporters are under no contractual obligation to accept the assignment. However, failure, or repeated failure, to accept the assignment will result in the invoking of one of the sanctions set out in paragraph 10 above.

19. Staff reporters are salaried employees of the Ministry and members of the Ontario Public Service Employees Union. As such, they receive the wages and benefits (including: OHIP, dental care, long term disability protection, pensions and seniority rights) provided for in the collective agreement under the Crown Employees Collective Bargaining Act. In addition to salary, they are entitled to an allowance for any accommodation, meal or mileage expenses which they incur while on Ministry business. Staff reporters are also entitled to an over-time meal allowance.

O. Reg. 404/84

Finance and Accounting Directive - Re: Employer Expenses - Meals (Exhibit 2)

Ministry of the Attorney General Manual of Administration - Part 2.6.5 (Exhibit 3)

Memo - Mileage Allowances (Exhibit 4)

20. Freelance reporters are not members of the union and do not receive any entitlement under the collective agreement. They are paid a flat hourly rate for time worked. That hourly rate is much lower than the basic hourly wage portion of the remuneration received by the staff reporters. Freelance court reporters do not receive payment for travel time but do receive the same mileage and accommodation allowance received by staff reporters.
21. Freelance reporters often arrive at a particular Court House for a booked day of work, only to find that the particular matter is not proceeding for any number of reasons (i.e. the list has folded, a case has been adjourned, or a plea has been entered.) In such an instance the Ministry will allow a maximum three hours to be charged for that day and the next day (if scheduled) unless 48 hours notice of cancellation has been given to the freelance court reporter. The given reporter may very well have lost more revenue, as she will have been required to set aside the whole day



for work. Frequently the freelance court reporter is requested to sign in at the Court House and indicate the time of arrival on the same book or pad that is used for all other employees.

22. Freelance reporters' fees are paid on a per diem basis out of the Ministry's advance account. For audit purposes freelance reporters are required to complete a Daily Attendance Register in support of their weekly Invoice for Personal Service. Daily attendance is computed on the basis of hours spent in Court, and may include up to a maximum of half an hour grace period for set up and the same for wrap up, and any additional Ministry authorized time spent in Court beyond regular Court hours. The Invoice for Personal Service shows the billable time, unit price, and total amount for each day. The fees charged are in respect of time spent and in addition if a transcript is required the typing may or may not be done at either government offices or at the home of the freelance reporter; in any event payment is made on a per page basis in the Invoice for Personal Service. Invoices must be submitted to the Local Manager for signing and can be submitted on a monthly, bi-weekly, or daily basis. The local manager to whom the Invoices are submitted as aforesaid is the same person who monitors the staff court reporters; he submits the said invoices to the Attorney General Department for payment. Rates of pay for attendance of freelance reporters are fixed by regulation.
23. In addition to the remuneration described above, all Court Reporters (whether staff or freelance) are obliged by regulation to type up requested transcripts and to charge the transcript fee set by regulation. Staff reporters can type up transcripts during their regular working hours and thereby receive both salary and transcript fee for the same period of work. Freelance reporters, except those that work exclusively for the Ministry, have to type transcripts at times when they are not receiving any other payment. Such typing may be done either at the home of the freelance reporter or at the Court facility. Freelance reporters employed exclusively by the Ministry are occasionally paid their hourly rate while typing up transcripts but they are usually required to do this typing after scheduled working hours. Many freelance reporters use equipment owned by the Provincial Government which include recorders, transcribers, steno-masks, steno-typers, and steno-books.



24. All Court Reporters are given access to Ministry photocopiers for making transcript copies, and all reporters must pay a usage charge of five cents per impression for those copies. The printing of transcripts for appeals is done for the Ministry of Government Services and reporters are not charged for such printing whether they be staff reporters or freelance reporters.
25. From time to time freelance court reporters are requested to perform clerical duties at the direction of the Court Administrator or manager in order to fill up the time upon which minimum payment is being made as indicated in paragraph 21 above.

### C. COURT INTERPRETERS:

1. Pursuant to the provisions of the Administration of Justice Act, the Crown Attorney is responsible for the provision of interpreters in any criminal case, investigation or coroner's inquest.

The services of an interpreter may also be required under the Courts of Justice Act at the request of a party or counsel where proceedings are in French or English and the requesting party or counsel speaks the other language.

Implicit authorization for the use of interpreters is also found in both federal and provincial statutes where there are provisions for payment of interpreter's fees, for example, the Criminal Code, Tariff A, under the Rules of Practice and the Regulations under The Coroner's Act all provide a scale of fees for payment of interpreters.

Administration of Justice Act, R.S.O. 1980, c.6, s.(2)

Coroner's Act, R.S.O. 1980, C.93, s.48(1)

Courts of Justice Act, 1984 c.11, s.136

Criminal Code, R.S.C. 1970 c. C-34, Schedule of Practice, Tariff A, Item 27

O. Reg. 73682, s.2

2. All court interpreters are subject to the jurisdiction of the Chief Justice or a Chief Judge of a Court and to a presiding Judge or Master while the Court is in

session. In addition, interpreters are required to swear an oath to truly and faithfully discharge their duties.

Courts of Justice Act, 1984 S.O., c.11, s.95

3. The system of securing the services of qualified court interpreters is currently in a state of flux. The older system which is still in use for many languages, involves selecting interpreters from a list of qualified interpreters, which is maintained and updated in the court interpreter's office located at the Old City Hall. The list is composed largely of local residents and includes interpreter services in 59 different languages and dialects.

As of November 1985, Interpretation Services introduced a system whereby all existing and future interpreters will be registered. The proposed registration system involves:

- a. the completion of a registration form and submission of a current curriculum vitae to Interpreters Services; and
- b. the demonstration by means of a standard test: of language proficiency and interpretation abilities in the professed working language.

The new registration system is mandatory for all interpreters and where testing for a particular language has been completed (eg. French language) the registration system supersedes the list of interpreters as the appropriate base from which to select interpreters. See memo appended as Exhibit 12.

4. Ontario Courts utilize three types of Court Interpreters:
  - a) "staff": full time employees of the Ministry of the Attorney General, appointed to the public service;
  - b) "regular": full time employees of the Attorney, not [expressly] appointed to the public service;
  - c) "casual": persons employed less than full time by the Ministry of the Attorney General.
5. The scheduling of interpreting services is shared between the Court administration and the regular interpreters. Requests for interpreters are made to the Court Clerk's office, which, in turn, forwards the

request in writing to the Court interpreters office. Every month, two or three regular interpreters are assigned the function of scheduling regular interpreters to trials or where a regular interpreter is unavailable, contacting a casual interpreter. The scheduling is noted in a diary located in the court interpreter's office.

Where unscheduled requirements for an interpreter occur, such as First Appearance Courts, an adjournment is requested so that a regular interpreter can respond or a casual interpreter can be summoned.

6. With respect to staff interpreters, the Court interpreter's office is responsible to the civil service for appointing interpreters. To date, those interpreters consist only of those permanently engaged in the translation of French. There are eight such interpreters: four in the Judicial District of Ottawa-Carlton, one in each of the Districts of Cochrane and Sudbury, one in the Judicial District of York and one in L'Original.
7. Staff interpreters are salaried employees of the Ministry and members of the Ontario Public Service Employees Union. As such, they receive the wages and benefits (including OHIP, dental care, long term disability protection, pensions, and seniority rights) provided for in the Collective Agreement under the Crown Employees Collective Bargaining Act.
8. Regular interpreters can be divided into two groups:
  - a) Regular interpreters who do work exclusively for the Minister;
  - b) Regular interpreters who, with the permission of the Ministry, make their services available to clients other than the Ministry.

Neither of the interpreters in groups (a) and (b) are contractually forbidden from working for employers other than the Ministry. However, it has been made clear to them that failure to adhere to the restrictions on their activity will cause the Ministry to remove their name from the list of eligible court interpreters or from the registry system, where applicable.

9. The regular interpreters who work exclusively for the Ministry are employed mainly at one of the



Metropolitan Toronto or area courts. They are required to be at the designated court six and one half hours per day, five days per week, and are paid for that period, regardless of the demand for interpreters service, on any given day. They are relied on to supply court interpreting services for that court. Failure by interpreter to attend on a regular basis will result in the interpreter's name being removed from either the list or registration system, where applicable.

10. Regular interpreters are sometimes requested to travel to other area courts and facilities (eg. College Park, Legal Aid) other than the court where they usually work. Regular interpreters are required to sign out when they leave their usual Court. While a regular interpreter is not under a contractual obligation to accept the assignment at another location, an interpreter's failure or repeated failure to accept the assignment will result in the interpreter's name being struck from the list of eligible interpreters or registration service, and inevitable loss of regular status.
11. Casual interpreters work on an "on-call" basis, as required. While casual interpreters are not restricted from seeking alternate employment elsewhere, failure to be available will result in an interpreter's name being removed from the list or registration system, where applicable, and in jeopardizing appointment as a regular interpreter.
12. Regular interpreters and casual interpreters are not members of the union and do not receive any entitlement under the Collective Agreement. They are paid two hourly rates; one rate for the first hour and another rate for the subsequent hours. The average hourly rate is much lower than the basic hourly wage portion of the remuneration received by staff reporters. The only additional monies received are travel expenses where applicable.
13. Regular interpreter's fees are paid out of the budgets of the receiving courts. For audit purposes, regular interpreters are required to complete a Daily Attendance Register. A clerk in the Court's Clerk office calculates the billable hours on the basis of the information contained on the daily allowance register and then completes an invoice for Personal Service (the "invoice") every 5 days which indicates the total billable hours for the period and the amount of fee payable. This invoice is validated by the office



supervisor and is usually but not always presented to the interpreter for his/her signature. The invoice is then forwarded to the accounting section for processing and a cheque is issued out of the accountable advance account.

14. Casual interpreters are paid cash on a daily basis for services received. A record of casual interpreters' services are kept on an Interpreter Invoice. The Interpreter Invoice is submitted to the Court Clerk for signing at the end of a Court day wherein the Clerk calculates the total attendance time of the casual interpreter and any additional authorized time. This process is repeated for each Court attended by the casual interpreter that day. At the completion of his daily duties the interpreter submits the Interpreter Invoice to the Interpreter Fee Clerk. The Fee Clerk checks that the spaces provided on the invoice for the date, Clerk authorization, the interpreter's name, and social insurance number have been filled in. Payment is issued out of the assigned cash fund and a copy of the paid Interpreter Invoice is submitted to the Accounts Payable Clerk for reimbursement by way of cheque drawn on the accountable advanced account. A log is maintained for a record in accumulative payment to interpreters for T-4 purposes.
15. The Ministry provides all court interpreters with an office at all Metro Toronto Court locations. For example, in the Old City Hall the room adjoins a courtroom and is equipped with four desks, three phones (including one outside line, one line to the Court Clerk's office and one line to the Courts) office partitions, an air-conditioner, a small fridge, a toaster, a coffee maker, a coat rack and a closet.
16. As a result of the hourly rates paid, the allowance disbursements, the active role of the Ministry in registering and testing court interpreters, the sanction that the Ministry can invoke against interpreters and the Ministry supplying much of the work for regular interpreters, most regular interpreters, and all regular interpreters employed exclusively by the Ministry, consider themselves to be employees of the Ministry.

#### D. SMALL CLAIMS COURT EMPLOYEES:

1. The daily operation of the Provincial Court (Civil Division) is performed and/or supervised by Clerks

and Bailiffs. Each Clerk is put in charge of a court office located in one of the 119 territorial divisions of the court, and each Bailiff is in charge of the service and enforcement of processes within that division. These territorial divisions are set out in a regulation drafted by the Ministry of the Attorney-General and formally approved by the Lieutenant-Governor in Council.

Court of Justice Act, Section 87(1)(e)

O. Reg. 159/85 (concerning territorial divisions)

2. The Clerks and Bailiffs are, or were, chosen by the Director and his staff, or their successors, and then those persons are formally appointed to their positions by the Lieutenant-Governor in Council. An appointment can be revoked and revocation will occur if the individual in question fails to meet the standards set by the Ministry of the Attorney-General.

Courts of Justice Act, Section 86(4)

3. The Clerks and Bailiffs are assisted by Deputy Clerks and Bailiffs. These deputies are available to assist with the work assigned expressly to Clerks and Bailiffs. Prospective deputies are suggested to the Director, who may approve or reject the suggestion. The approved suggestions are forwarded to the Lieutenant Governor in Council for formal appointment. An appointment as a deputy can be revoked and revocation will occur if the individual in question fails to meet the standards set by the Ministry of the Attorney-General.

Memorandum, to Clerks and Bailiffs, Small Claims Courts from R.A. McFarland dated September 20, 1984, (Exhibit 15)

4. The standards set by the Ministry of the Attorney-General can be divided into two major categories;
  - (a) Rules of the Provincial Court (Civil Division);
  - (b) Financial and personnel management regulations and guidelines,

and each of these will be dealt with in turn.

5. The rules established by the Rules Committee of the Provincial Court (Civil Division) require that Clerks

and Bailiffs perform certain duties. The Ministry of the Attorney-General has published a detailed Ministry of the Attorney-General, Courts Administration, Provincial Court (Civil Division) Procedural Manual, which sets out what must be done to fulfill those duties. That manual contains elaboration on the rules, and sets out related policy, practice and procedure to be followed by all court offices.

6. The manual is supplemented regularly by revised pages and by directive memos issued from the Director's office to the Clerks and Bailiffs. In addition, a manual expressly for Bailiffs is being drafted.

Instructions for providing bilingual court services  
(Exhibit 17)

Memorandum dated September 19, 1984, to Small Claims Court Clerks from R.A. McFarland  
(Exhibit 18)

Memorandum to Small Claims Court Clerks from R. McFarland dated October 27, 1982 (Exhibit 19)

Memorandum to Clerks and Bailiffs, Provincial Court (Civil Division) from R. McFarland, dated April 29, 1986 (Exhibit 20)

7. Daily compliance with the requirements of the rules is ensured in three additional ways. First, the Ministry of the Attorney-General supplies all of the court forms (ie Statements of Claim and Defence, etc.) and all other related stationery, to all court offices. These forms are the ones which must be used. Second, a periodic audit is done, which consists of a review of financial details, but also involves a review of whether the procedural manual is being followed. Third, complaints from the public are referred to the Director. Those complaints aid him in identifying difficulties with court office personnel and procedure.
8. With respect to financial matters, the Courts of Justice Act empowers regulations "prescribing the duties of the Clerks and employees of Courts" including the Provincial Court (Civil Division). Any such regulations would be drafted by the Ministry of the Attorney-General.

Courts of Justice Act, Section 87(1)(d)



9. To date, this regulatory power has been used to control the funding of Provincial Court (Civil Division) Court offices. The regulations drafted by the Ministry of the Attorney-General require and authorize that litigants be charged a set fee for taking certain steps in the course of an action. The fees are retained by the Clerks and Bailiffs of the various court offices and are used to finance the operation of those offices. When the annual amount collected falls below a certain total, the Ministry of the Attorney-General pays an additional allowance to the Clerk and or Bailiff on a sliding scale, and so subsidizes the operation of the given court office. The fees and the allowances, as well as related book keeping requirements, are set out in the regulations prepared by the Ministry of the Attorney-General.

O. Reg. 796/84 (concerning duties of clerks and bailiffs)

O. Reg. 795/84 (concerning fees and allowances)

10. The Ministry of the Attorney-General also uses the Provincial Courts (Civil Division) Procedural Manual to establish bookkeeping requirements. A newly issued chapter in the manual, entitled Accounting Procedures, sets out procedures formulated by Audit Services Branch of the Ministry for use in all court offices.

Memorandum to Clerks and Bailiffs, Provincial Court (Civil Division) from R. McFarland dated April 29, 1986 (Exhibit 21)

Courts Administration, Provincial Courts (Civil Division) Procedural Manual, pp.36-1 to 36-22 (Exhibit 22)

11. Adherence to the Ministry of the Attorney-General's requirements, in respect of both the rules and financial matters, is further ensured by a periodic audit of all court offices. That audit is done by Audit Services Branch personnel who visit all the court offices and conduct a careful review of the procedures being followed and the records being kept. The results of each individual audit are supplied to the Director, who forwards a copy to the Clerk of the relevant court office, along with directions for improvement in areas where there has been inadequate performance. The Clerk is responsible for remedial action and he or she must provide a written response outlining the action taken.



12. Two separate types of court office financing arrangements have developed in the Provincial Court (Civil Division), and the court offices have been labelled accordingly. "Fee court" offices are so called because all wages are paid out of the available fees and allowances authorized by the regulation. "Salary court" offices are so called because the Ministry of the Attorney-General ensures that all personnel receive set salaries, which happen to be equivalent to Crown employee, or public service salaries. Each type of court office will not be discussed in detail.
13. In a "fee court" office, the Clerk and Bailiff are required to provide all court services and, in return, they only receive the fees and allowances set out in the regulations. The Clerk and/or Bailiff is free to spend these amounts as he or she sees fit. They may hire staff to assist in the running of the court, but they are not required to do so. In the event that staff is hired, the clerk sets the salaries and benefits payable to that staff. If the court office's combined income from fees and allowances is not sufficient to pay promised salaries, then that is the problem of the Clerk and Bailiff. The Ministry of the Attorney-General will not supply the additional funds. As a result, "Fee court" office employees are almost invariably being paid less than "Salary court" employees. In addition, the "Fee court" office employees receive far fewer, if any benefits.

Furthermore, office equipment purchases have to be paid out of fees and allowances collected. The Ministry of the Attorney-General will not supply office equipment, regardless of how much it is needed. With respect to rent, the Clerk and Bailiff are responsible for paying the rent out of fees and allowances, unless the court office happens to be located in a government building.

14. "Salary court" offices are subject to a different type of financing and control. Such offices are found in most of Ontario's major metropolitan centres (ie, North York, Scarborough, Etobicoke, Toronto, London, Ottawa, Hamilton, Sudbury and Windsor) and they employ many more staff than are employed in any of the "Fee court" offices.
15. The "Salary court" offices operate under the same fee and allowance regulation as do the "Fee court" offices. However, the wages of the Clerk and all the employees are set and paid by the Ministry of the

Attorney-General. If the fees and allowances are insufficient to pay the wages in any given year, then the Ministry supplies the necessary further subsidy. Some of the "Salary court" office Bailiffs are on a salary, while others conduct their part of the operations on a "Fee court" basis.

Ministry of Attorney-General Pay Cheque (Exhibit 23)

16. All the salaries of "Salary court" office employees are set to match public service rates. The Ministry of the Attorney-General assigns the employees to classifications equivalent to those in the public service, and then guarantees that they will receive the same rates. The "Salary court" employees are assigned to the equivalent of the Clerical Services category under the current Collective Agreement between OPSEU and the Crown in Right of Ontario. In addition, the Ministry sets the other terms and conditions of employment (including benefits). This is done by having the Clerks and Bailiffs administer their offices in accordance with the relevant provision of a manual entitled Ministry of the Attorney-General, Policies and Procedures Administration Manual. Revisions to the manual are issued periodically by the Director.

Ministry of the Attorney-General, Policies and Procedures Manual, Administration, SCC 15-05-05 to 15-10-05 (Exhibit 24)

Maternity leave - Sub - Allowance Benefits Correspondence (Exhibit 25)

Vacation Entitlement Correspondence (Exhibit 26)

Memorandum to Small Claims Court Clerks from R.A. McFarland, dated January 5, 1982 (Exhibit 27)

17. The terms and conditions of employment for "Salary court" office employees are much worse than those of public servants, even though the wages are identical. However, the Ministry of the Attorney-General has had a policy of gradually improving those terms and conditions so as to bring them into line with those enjoyed by public servants.

Memorandum to Small Claims Court Clerks from R.A. McFarland, dated January 5, 1982 (Exhibit 27)

Memorandum to R.A. McFarland from Orville M. Mitchell, dated September 15, 1980 (Exhibit 28)



18. New positions are filled by the Clerk of the given court office, but only after getting approval from the Director. The Clerk decides that a new person is needed to carry a share of the court office workload. The Clerk then requests approval for the new position from the Director. If the Director grants approval, he also sets the classification and salary range. The Clerk then tries to fill the position for the salary.
19. With respect to bookkeeping, the "salary court" offices have to follow the same regulations which are also applicable to the "fee court" offices. However, the Ministry of the Attorney-General requires the "salary court" offices to follow an additional series of procedures established for controlling the receipt, processing and disbursement of court fees, and the keeping of all related records, and reporting on these matters to the Ministry. These additional requirements are also set out in the Policies and Procedures Administration Manual. Revisions of those requirements are issued periodically by either the Director and his staff or by the Financial Management Branch of the Ministry of the Attorney-General.

Ministry of the Attorney-General, Policies and Procedures Administration Manual, SCC 05-05-05, 05-05-10, 05-05-15, 05-05-20, 05-10-05 to 20-10-05 (Exhibit 29)

Memorandum dated June 20, 1978, to Division and Branch Heads et al from B.W McLoughlin, Assistant Deputy Attorney-General and Director of Courts Administration (Exhibit 30)

Memorandum dated May 8, 1979, to Directors et al. from H.A. Gibbs, Director of Finance, Financial Management Branch, Ministry of the Attorney-General (Exhibit 31)

Memorandum dated January 31, 1980, to Chairmen of Boards and Commissions et al from H.A. Gibbs (Exhibit 32)

Memorandum dated July 2, 1985, to Clerks, Bailiffs and Referees - Provincial Court (Civil Division) (Exhibit 33)
20. As part of these extra procedures, almost all purchases and expenditures, including all office equipment orders, must be requisitioned through the

Ministry of the Attorney-General, Administrative Services Branch. The Ministry may respond in three different ways to a requisition. The request will either be turned down, or the Ministry will simply supply the item or the Ministry will authorize payment of the fees and allowances.

Ministry of the Attorney-General, Administrative Services Requisition, dated May 8, 1985 (Exhibit 34)

Memorandum to Clerks, Bailiffs, Referees-Small Claims Courts from R.A. McFarland re Purchase Procedures-Small Claims Courts, dated September 24, 1981 (and attachment dated September 22, 1981) (Exhibit 35)

Memorandum to Clerks, Bailiffs, Referees-Provincial Court (Civil Division) from Helen Walker, Executive Assistant, Provincial Court (Civil Division) (Exhibit 36)

Memorandum to Clerks, Bailiffs and Referees-Provincial Court (Civil Division) from Helen Walker, Executive Assistant, Provincial Court (Civil Division) dated February 20, 1985 (Exhibit 37)

Ministry of the Attorney-General, Manual of Administration, Subject: Delegated Authority to Make Local Purchases, dated December 1, 1984 (Exhibit 1, 1984 (Exhibit 38)

21. Adherence to all these additional procedures is confirmed by the periodic audit mentioned earlier. In the case of "Salary court" offices, that audit is done annually and will include a review of all records and procedures concerning accounting and personnel.
22. It has long been the intention of the Ministry of the Attorney-General to arrange an untroubled amalgamation of the "salary court" offices into the public service of Ontario. The Courts of Justice Act contains a section allowing the Lieutenant Governor in Council to designate areas wherein the Clerks, Bailiffs, and Referees of the Provincial Court (Civil Division) would be appointed to a position of a Civil Servant under the Public Service Act. Furthermore, the Courts of Justice Act provides that "such other employees as are considered necessary for the administration of the Courts in Ontario may be appointed under the Public Service Act".

Courts of Justice Act, Section 87(1)(g) and 94



Ministry of the Attorney-General, Policies and  
Procedures Manual, Administration, SCC 15-05-05  
(Exhibit 24)

[emphasis added]

### III. SUBMISSIONS OF OPSEU:

Counsel for the Union maintains that now that all the employees in question have been held to be Crown employees the Ministry cannot keep them in a state of limbo by just declining to formally appoint them to the public service under the Public Service Act. Counsel argues that the only reason they were not appointed to the public service when they were originally hired is because the Ministry incorrectly denied that they were employees and maintained that they were independent contractors. Counsel submits that the Ministry should be estopped from relying on its own error (that of denying their status as employees and thus their failure, on that basis, to appoint them to the public service when they were hired) to claim that they are not public servants and not in the Union's bargaining unit.

Counsel for the Union emphasizes that although Regulation 232 under C.E.C.B.A. designates a number of different employee organizations, it recognizes no group of employees employed directly by the Crown who are not public servants. Counsel argues that the only Crown employees who are not also public servants (with the exception of employees specifically excluded under C.E.C.B.A. or the P.S.A.) are persons who are employed by Crown agencies (including boards and commissions) and not in the direct service of the Crown like the employees in question. Counsel comments that it is only these Crown employees who are placed in different bargaining units under Regulation 232 (i.e. persons who are employed by boards, commissions and Crown

agencies but not directly by the Crown) and not Crown employees employed directly by the Crown in the service of the Crown.

Counsel comments, on this basis, that if the employees in issue are not public servants included in OPSEU's bargaining unit, they would not fall into any of the bargaining units designated by the Regulations under C.E.C.B.A. or receive the benefits of the P.S.A. Counsel emphasizes that the P.S.A. is substantially designed to endow employees of the Crown with rights as against the Crown. She comments that the Legislature would not have intended to give a ministry unfettered discretion to decide which employees it would include in the public service bargaining unit and give rights under the P.S.A. and which it wouldn't, simply through its decision as to which Crown employees it would appoint expressly under sections 6, 7 or 8 of the P.S.A. and which it wouldn't.

Moreover, relying on section 94 of the C. of J. Act, set out above, the Union argues that the Ministry cannot in fact employ the people in dispute, except as members of the public service, now that they have been found to be Crown employees. Counsel submits that whether or not the Ministry has taken the formal step of actually appointing them to the public service, they must be deemed to be public servants now that they have been found to be Crown employees. Section 94 of the C. of J. Act stipulates that employees who are considered necessary for the administration of the courts may be appointed under the P.S.A.

Counsel does not suggest that "may" in section 94 carries a meaning equivalent to "shall". Counsel acknowledges that the Ministry has the discretion to decide whether or not such employees are necessary for the administration of the Courts. She argues,

though, that once the Ministry has decided that certain employees are necessary, the source of the power to hire them is in section 94, an empowering provision. She maintains that that authorization provides that they be hired under the P.S.A. Counsel submits that without section 94, the Ministry of the Attorney General would have no power to employ court reporters, court interpreters or such other employees it considers necessary for the administration of the courts in Ontario.

To support the submission that "may" in section 94 is an empowering provision and provides the authority to do what the Crown could not otherwise do, counsel for OPSEU relies on the following passage from Re Falconbridge Nickel Mines Ltd. and Minister of Revenue for Ontario (1981), 121 D.L.R. (3d) 402 (Ontario Court of Appeal) at p.408:

I do not, however, disagree with the proposition that in certain circumstances the word "may" in a statute must indeed be taken to mean "shall". In some contexts, the word "may" is neither necessarily permissive nor necessarily imperative, but rather merely empowering. Its function is to empower some person or authority to do something which, otherwise, that person or authority would be without any power to do. In such a case, the word "may" merely removes an impediment to the doing of that thing leaving it open to be determined, in the context of the legislation in question, whether or not the Legislature intended that, where the conditions if any prescribed for the exercise of the power are met, the power will in fact be exercised.

Counsel for O.P.S.E.U. maintains that the Tribunal should deem the Crown employees to be public servants notwithstanding the absence of an express appointment to the public service under sections 6, 7 or 8 of the P.S.A. Counsel argues that the



Tribunal should look beyond the actual form of appointment chosen by the employer, i.e. the absence of an express appointment to the public service, and find the existence of the form of hiring that should have occurred. Drawing from section 94 of the C. of J. Act and section 3 of the Min. of the A-G. Act, counsel maintains that the form of appointment that should have occurred was an appointment under the P.S.A.

To support the position that the important factor to consider in determining the nature of an appointment by the Crown is what occurred in fact and not simply what the Crown intended to do or thought it was doing, counsel for OPSEU relies on the following decision of the Grievance Settlement Board (G.S.B.): OPSEU and The Crown in Right of Ontario (Ministry of Government Services) (grievance of L. Beresford) (file no. 1429/86), decision dated November 12, 1987 (chaired by M.G. Mitchnick), (hereinafter referred to as "Re Beresford"). In Re Beresford, the G.S.B. was required to determine whether the grievor had in fact been "dismissed" within the meaning of section 18(2) of C.E.C.B.A. and thus whether she could process a grievance in respect of her termination. The employer argued that the grievor had been appointed to a fixed-term contract in the unclassified service and that the failure to renew the contract at the end of its term was permitted and was not a dismissal which could be grieved. The Union, on the other hand, argued that the grievor's appointment to the unclassified service was improper and thus could not be used to justify her termination by failure to renew the contract.

The grievor in Re Beresford was employed as a telephone console operator. At the time of the termination, half the Ministry's console operators were classified staff and half were unclassified (i.e. contract or GO-temp employees). There were no differences in the work assignments, duties, work stations, hours of work or shifts



between the classified and unclassified console operators. The Union argued that the grievor should never have been treated as unclassified staff in the first place and that her form of appointment which limited the term of her appointment was therefore invalid, i.e. because she was improperly appointed to the unclassified staff.

In the decision in Re Beresford, the G.S.B. commented at p.4 that "public servants" are divided into the "classified" service (which it stated is synonymous with the "civil" service) and "unclassified" service. It noted that the methods of appointment to each service are distinct. It stated that members of the classified (or civil) service are appointed by the means set out in section 1(a) of the P.S.A. (appointed to the service of the Crown by the Lieutenant Governor in council on the certificate of the Commission or by the Commission) pursuant to the powers granted in section 6 and 7 of the P.S.A. It noted that appointments to the unclassified service are authorized by section 8 of the P.S.A. which indicates that a minister or his designate may appoint a person to a position in the unclassified service for a period of not more than one year on the first appointment and for any period on a subsequent appointment. The G.S.B. noted that the distinction between the classified and unclassified service is not a distinction based on the job but rather the way in which the employment is created, i.e. by section 6 and 7 for the classified staff or section 8 for the unclassified staff.

Of particular importance to its decision in Re Beresford, the G.S.B. held that section 6 of Regulation 881 under the P.S.A. was intended to be exhaustive in describing positions in the unclassified service. It found that the employer presented no evidence of its intentions or perception regarding the grievor's position. The G.S.B. held, on that basis, that the position to which the grievor was appointed was not one that fell within any of the situations encompassed by the three groups of unclassified service positions

set out in the regulations. Accordingly, it held that the grievor's appointment to the unclassified staff was improper and unauthorized by the provisions of the P.S.A. and the regulations thereunder. The G.S.B. then remitted the matter to the parties for attempted resolution based on its finding and remained seized for remedy.

In a subsequent decision, OPSEU and Crown in Right of Ontario (Ministry of Revenue) (grievance of C. Milley), (1972/87), decision of M.G. Mitchnick dated May 12, 1988, (hereinafter referred to as "Re Milley"), the G.S.B. endorsed its decision in Re Beresford, and concluded, in similar circumstances, that the purported limited term appointment to the unclassified service of grievor C. Milley had been improper and unauthorized under the provisions of the P.S.A.

The application for judicial review of both Re Beresford and Re Milley was denied by the Divisional Court through a decision dated December 6, 1988. The principles in these two decisions have been confirmed more recently in OPSEU and Crown in Right of Ontario (Ministry of Community and Social Services) (grievance of Blondin et al), (78/89), (decision of E.K. Slone dated August 31, 1989). Counsel for the Ministry in fact acknowledges in the instant matter that Re Beresford reflects the current state of the law.

The Union relies on Re Beresford and Re Milley in the instant matter to argue that the important factor in determining the grievors' status is not the employer's intention (i.e. to appoint them to the unclassified service), but rather what the evidence reveals occurred in fact. The Union stresses that in the instant situation the Employer may not have intended to appoint the persons in issue to the unclassified staff but the facts reveal that that is what actually happened. The issue of remedy that had been

remitted back to the parties in both Re Beresford and Re Milley was dealt with by the G.S.B. in OPSEU and The Crown in Right of Ontario Ministry of Revenue (1429/86, 1972/87) (grievances of Beresford and Milley), decision dated November 29, 1989, (chaired by J.W. Samuels), (hereinafter referred to as "Re Beresford/Milley"). Drawing on the G.S.B.'s conclusion that grievors L. Beresford and C. Milley had been improperly appointed to the unclassified staff and were therefore not unclassified staff, the Union argued that they must be classified staff. The Union submitted that only two types of public servants are contemplated by the P.S.A., classified and unclassified, and that if they weren't one (i.e. unclassified staff) then they must be the other (i.e. classified staff).

The G.S.B., however, did not accept the Union's position. Having regard to (1) the undisputed fact that the grievors had not been appointed to the classified service in accordance with the procedures established in the P.S.A. for such appointments and (2) its earlier finding that they had not been properly appointed to the unclassified service, the G.S.B. in Re Beresford/Milley concluded that the grievors had not been effectively appointed to either the classified or unclassified staff since, as it held, appointment to either service must be done in accordance with the requirements of the legislation and the collective agreement. The G.S.B. further held that it did not have the authority to turn the grievors into classified employees since appointment under section 18 of C.E.C.B.A. was the exclusive domain of the employer. The G.S.B. commented that the grievors might never have been appointed to the classified posts if the positions had been posted as required for classified positions under the collective agreement.

Although the G.S.B. in Re Beresford/Milley did not automatically deem an appointment to the classified service notwithstanding the unauthorized, improper



appointment to the unclassified service, it did not deny the grievors a remedy on the ground that they had not been properly appointed to either the classified or unclassified service. Nor did the G.S.B. find that they no longer had rights under the collective agreement or that they must now be found to no longer be public servants. The G.S.B. still looked to the collective agreement to determine the grievors' rights. It commented that the collective did not expressly contemplate persons improperly appointed to either the classified or unclassified staff and held that the grievors' rights under the collective agreement, therefore, had to be inferred from the agreement. It then compensated the grievors under the collective agreement on the basis of Employment Standards Act entitlements for the abrupt termination of their employment since they should not have been engaged on simple limited-term contracts, i.e. since they did not fall into the three groups of unclassified service positions.

Counsel for the Union maintains that in the instant situation the Tribunal should deem the employees to be part of the classified service notwithstanding their irregular appointments. Counsel argues that the instant situation is distinguished from Re Beresford/Milley because the instant matter does not involve potential third party interests related to the posting provisions of the collective agreement for classified staff. In the instant matter, according to counsel for OPSEU, the type of appointment in issue is under section 8 of the P.S.A. for the unclassified service and does not involve the rights of third parties which would come into play with an appointment to the classified service. Instead, according to counsel for OPSEU, the appointment in issue concerns the individual employee alone, filling out and signing an employment contract (exhibit #1) which then goes to personnel for routine checks. The Union maintains that this is not the type of appointment process that should create a barrier to a finding



that the employees are public servants particularly when, in its submission, they are required so to be by the language of section 94 of the C. of J. Act.

Counsel for the Union argues that even if the Tribunal declines to simply deem the employees in question to be public servants, there has been in any event substantial compliance with section 8 of the P.S.A. such that there has been in fact an appointment to the public service under the P.S.A., whatever the Ministry might have thought it was doing. Counsel refers to the process for appointment to the unclassified service under section 8, as set out in the Agreed Facts, Preamble, paragraph 7. She maintains that since initialing a contract by a person in personnel constitutes undisputed compliance with section 8, the Tribunal should find substantial compliance with section 8 for the employees in question through the fact that these persons were employed in their positions in the service of the Crown with the knowledge of the Minister and Deputy Minister. Counsel maintains that substantial compliance of this nature is sufficient to create an appointment to the public service. Counsel urges the Tribunal to look at the objective facts of employment rather than the label the Ministry has chosen to put on those facts and, on that basis, to find that the employees in question are public servants for labour relations purposes.

In support of its position respecting substantial compliance with section 8 and the overriding impact of what is in fact done as opposed to what the employer intended to do, counsel for the Union relies on two decisions of the Supreme Court of Canada: Dore v. Canada (1987), 81 A.R. 77 (S.C.C.) and Canada (Attorney General) v. Brault (1987), 81 N.R. 60 (S.C.C.). In Dore v. Canada, the Canada Employment Centre assigned the additional functions of supervisor of the reception and inquiries section to a person occupying a position in the Public Service of Canada, pending classification of a new

position for such functions. Gisele Dore appealed the assignment of the supervisor functions to another person under section 21 of the Public Service Employment Act (P.S.E.A.) on the ground that the assignment of the functions constituted an appointment to a position in the public service which had not been based on selection according to merit, as required by section 10 of the P.S.E.A. The Department admitted that the selection had not been made on merit, but maintained that there had been no "appointment to a position" and thus that there was no right of appeal under section 21 of the P.S.E.A.

The Supreme Court of Canada held in Dore v. Canada that the issue of whether or not there had been an appointment could not turn on whether the Department intended to create a position and intended to make an appointment within the meaning of the P.S.E.A. Mr. Justice Le Dain stated at p.82 that the application of the merit principle and the right of appeal under section 21 of the P.S.E.A. "cannot depend on whether the Department chooses to regard what is done as the creation of a position and an appointment to it within the meaning of the Act" (emphasis added). The S.C.C. stated that the determining factor in respect of the application of the merit principle and right of appeal was what the Department had done objectively as a matter of fact and not what it may have intended or understood it was doing.

The S.C.C. found on the facts before it in Dore v. Canada that the assignment had become one of significant and indefinite duration. In application of the above-described principle, the S.C.C. held on the basis of these facts that there had been a creation of a position in the Public Service for the purposes of the merit principle and right of appeal (not simply a temporary assignment of function), notwithstanding that the position had not yet been classified for remuneration and other purposes by the

Treasury Board. Otherwise, the S.C.C. stated, the merit principle and right of appeal could be circumvented by the Department merely by a failure to proceed to classification.

In Canada (Attorney General) v. Brault, *supra*, the Department of National Revenue notified customs inspectors of the creation of a canine detection unit and invited applications for assignment of a customs inspector as a dog handler for which specific required qualifications were set out. Two customs inspectors who had not been selected for the unit appealed under section 21 of the P.S.E.A. on the ground that a new position had been created and that the appointment had not been based on selection according to merit as required by section 10 of the P.S.E.A. The Department admitted that its assignment had not been based on merit but maintained that what was involved was merely an assignment of an additional function in the existing position of customs inspector and not the creation of a new position. The Appeal Board concluded, however, that a new position had been created and thus that selection according to merit was required. On that basis, it allowed the appeal and set aside the appointment that had been made by the Department of National Revenue.

On review, the Federal Court of Appeal in Canada (A-G) v. Brault, set aside the decision of the Appeal Board and held that a position within the meaning of the P.S.E.A. could only be created by a clear administrative decision and expression of intention to create such a position. The Federal Court of Appeal held that absent such an expression of intention and decision, the creation of a position could not result from a change in the functions of a position. It then found that no position had been created and that, therefore, selection according to merit was not required and the grievors were not entitled to an appeal process.



Subsequently, the Supreme Court of Canada in Canada (A-G) v. Brault held that a new position could be created by a substantial (although not minor) change in the functions of an existing position, whether or not the administration chose to regard the change as creating a new position. Otherwise, the S.C.C. stated, the merit principle and right of appeal under the P.S.E.A. could be readily circumvented by the Department. The S.C.C. then held on the specific facts before it that the change in function which was of such a significant and substantial nature as to require additional qualifications amounted to the creation of a new position for which there was a right of appeal under section 21 of the P.S.E.A.

Counsel for OPSEU in the instant matter emphasizes that in both Dore v. Canada and Canada (A-G) v. Brault, the S.C.C. found that the assignment of duties actually constituted an appointment under the P.S.E.A. notwithstanding that the employer maintained that it had not intended to make such an appointment. Counsel argues that these cases demonstrate that it is the objective facts as opposed to the expressed intention of the employer that constitutes the determining factor in deciding the appropriate characterization of a position and whether an appointment has been made.

In Syndicat General du Cinema et De la Television (S.G.C.T.) v National Film Board and Public Service Staff Relations Board (1977) 16 N.R. 387 (F.C.A.), (hereinafter referred to as "Syndicat General du Cinema") the Public Service Staff Relations Board (P.S.S.R.B.) dismissed an application for certification by a group of persons who had been engaged under the authority of section 10(1) of the National Film Act which authorized the entering into of "contracts for personal services". The P.S.S.R.B. held



that such persons were not employees because they did not occupy a "position" in the Public Service and instead were engaged under contracts for personal service pursuant to section 10(1)(d) of the National Film Act. The contracts for personal services under which they were hired did not expressly designate a position to be occupied by them.

Under section 2 of the Public Service Staff Relations Act (P.S.S.R.A.) "employee" is defined as "a person employed in the Public Service, other than ..." and "Public Service" is defined as "the several positions in or under any department or other portion of the public service of Canada specified from time to time in Schedule I" (emphasis added). Section 13 of the National Film Act provides for continuing positions with the National Film Board and section 14 provides the Board with a general authority to employ such other persons as it may require from time-to-time in positions other than continuing positions.

It is clear that if the persons who were applying for certification had been engaged under section 13 or 14 of the National Film Act they would have been found by the P.S.S.R.B. to occupy positions in the public service and thus would have been a group of persons who could apply for certification. The persons for whom certification was sought in fact performed the same duties as employees appointed under the authority of section 13 or 14 of the National Film Act and who were included in the Technical Category Bargaining Unit. (That is also true for some of the disputed employees in the instant situation. The freelance court reporters and regular court interpreters have staff counterparts who perform the same work and are in the bargaining unit).

The P.S.S.R.B. concluded that even if the persons in the proposed bargaining unit were employees rather than independent contractors, they could not be employees within the meaning of the P.S.S.R.A. because they were not expressly appointed to a designated position in the Public Service. The contract for personal services under which they were engaged did not describe the position to be occupied by them but merely the nature of the services to be performed.

Mr. Justice Le Dain for the Federal Court of Appeal in Syndicat General du Cinema overturned the decision of the P.S.S.R.B. He commented that the positions referred to in s.14 were positions in the Public Service. He concluded that a person who is found to be an employee of the National Film Board on the general tests for distinguishing employees from independent contractors must be deemed to occupy a position within the meaning of section 14. At p.395 he reasoned as follows:

... There is no special formality required for employing a person in a position other than a continuing position. Undoubtedly the Board has the authority under paragraph 10(1)(d) of the National Film Act to enter into contracts for personal services with independent contractors, or "freelancers" ... as they are apparently called, but notwithstanding the form which such an engagement takes it may be open in a particular case to show on all the circumstances that the relationship is in fact one of employment. In such a case one would have to conclude that the employee occupies a position within the meaning of s.14. There cannot, in my opinion, be employees of the Board who do not occupy positions of some kind. As the Chief Justice has suggested, the word "position" may be regarded as an authority to employ; it may also be regarded as simply a synonym of occupation or employment -- a general reference to the functions performed by an employee.

In Canada (Procureur general) v. Alliance de la Fonction publique du Canada (1989), 97 N.R. 116, the Federal Court of Appeal reached a decision which might be

considered somewhat inconsistent with Syndicat General du Cinema. Leave to appeal to the Supreme Court of Canada has been granted but the case has not yet been heard. In Re Canada (Procureur general) the Solicitor General of Canada offered educational programs to penitentiary inmates. Initially the teachers were public servants represented by the Public Service Alliance of Canada (P.S.A.C.). Subsequently, however, the federal government contracted with the private firms to supply teachers to the Quebec penitentiaries. The P.S.A.C. filed an application with the P.S.S.R.B. for a finding that the teachers were members of its bargaining unit. The P.S.S.R.B. concluded that despite the appearance of a contract for services, an employer-employee relationship existed and, in addition, that the teachers were public servants. On that basis the P.S.S.R.B. concluded that they were included in the teaching group bargaining unit.

The Federal Court of Appeal overturned the decision of the P.S.S.R.B. It was satisfied that they were employees, not independent contractors, but was not satisfied that they were employees of the Public Service. In setting a context for its decision, the Federal Court of Appeal commented at p.117 that the decision of the P.S.S.R.B., "had implications for and cast doubt on the entire process of implementing the government policy of privatizing certain marginal services hitherto performed by employees of the Federal Public Service. The importance placed by the government on this application to review and set aside ... can be readily understood".

The Federal Court in Re Canada (Procureur general) distinguished at p.126 the decisions of the Supreme Court of Canada in Dore v. Canada and Canada (A-G) v Brault on the basis that in those cases "all concerned were without question employees of the Public Service who already held positions to which they had been duly appointed". It



emphasized by way of contrast that the rules with which they were concerned in their case at bar governed entry into the Public Service.

The Federal Court in Re Canada (Procureur general) then held that the P.S.S.R.B. had no authority to determine who is an employee of the Public Service; it noted that its authority only applied to a public servant recognized as such by provisions of legislation. The Court observed that the teachers in issue were never appointed by the Public Service Commission to positions created by the Treasury Board. The Court commented that it did not have before it a situation of an employer seeking to avoid its status as employer by acting through the artifice of a third party. The Court commented, though, that even if that were the case it would not matter in the public sector. The Court then referred the matter back to the P.S.S.R.B. on the basis that the teachers were not public servants with the meaning of the P.S.S.R.A.

Counsel for the Union argues that Re Canada (Procureur general) is in conflict with the Supreme Court of Canada's decision in Dore v. Canada and Canada (A-G) v. Brault and the Federal Court of Appeal's decision in Syndicat General du Cinema. She further comments that in any event it is not applicable to the Tribunal since section 40 of C.E.C.B.A. clearly confers the Tribunal with the jurisdiction to decide who is an employee, as was confirmed by the Divisional Court in O.P.S.L.R.T. and McKechnie Ambulance Service Inc., O.P.S.E.U. and the Crown in Right of Ontario and O.U.C.R., decision dated November 17, 1987. Moreover, the instant parties have each agreed that the Tribunal has jurisdiction to decide if the employees in issue are public servants. On this basis, counsel argues that the Re Canada (Procureur general) decision has no relevance to the issues before the Tribunal.



In Bergeron v. Minister of National Revenue (1988), 91 N.R. 52 (Fed. Court of Appeal) the Tax Court held that Bergeron's employment with the Quebec Government was not "insurable employment" under the Unemployment Insurance Act because she was not appointed and remunerated under the Quebec Public Service Act. She was hired for a short period of time on a contractual basis and was not remunerated in accordance with the Public Service Act.

The Federal Court of Appeal upheld the decision of the Tax Court. It stated that a person who has been hired irregularly to fill a position that was to have been filled by a public servant cannot, notwithstanding the irregularity, claim the status of a public servant. To be part of the Quebec public service and subject to the Public Service Act, the Court stated, it is necessary to have been appointed in accordance with the provisions of that Act. The Court commented that there is no authority other than that designated by the Public Service Act by appointing the person to the position he or she is claiming to give that person his status as a public servant.

Counsel for the Union maintains that Bergeron v. Minister of National Revenue case should be given little weight since it did not even refer to the decisions of the Supreme Court of Canada in Canada v. Dore and Canada (A-G) v. Brault which, she maintains, would point to a contrary conclusion.

Against the backdrop of the above-described decisions, counsel for the Union argues in the instant matter that it could not have been contemplated that the groups of employees in dispute would be allowed to exist in limbo, devoid of the status of public servants, now that they have been found to be employees of the Crown employed in the service of the Crown. Counsel maintains that if these persons are found to be

Crown employees, as they have been, but are not further found to be public servants and thus included in the bargaining unit, they would be deprived of almost every significant employee benefit. She comments that in the Employment Standards Act, R.S.O. 1980 c.137, as amended, for example, Parts I, II and III are not binding on the Crown. Substantial minimum employment standards for the public service are in the P.S.A. It is stated in section 30(2) of the P.S.A. that the Regulations made under section 30(1) establishing minimum employment benefits may be made applicable "to all or any part of the classified service or unclassified service".

Counsel for O.P.S.E.U. argues that the most anomalous result of the Ministry's position is that if these employees are not public servants, and are thus not members of O.P.S.E.U.'s bargaining unit because the Ministry did not expressly appoint them under section 6, 7 or 8 of the P.S.A., they would find themselves working side by side other employees who are doing exactly the same work and who are treated as public servants and are members of the bargaining unit. The staff court reporters and staff interpreters, who are acknowledged to be part of the classified service and the bargaining unit, perform the same function as the freelance court reporters and regular and casual interpreters in dispute.

Counsel further emphasizes that the Ministry has stated in its submissions in this matter that given the Tribunal's determination that the persons in dispute are Crown employees, it may in the future expressly appoint such persons to the positions in dispute under the P.S.A. Those persons, then, working in identical jobs and in an identical capacity clearly would be public servants and would fall within the bargaining unit. Counsel argues that unless the employees in dispute are found to be public servants too the result would be patently unreasonable, arbitrary and unfair: the persons

in dispute would be left outside the bargaining unit while persons currently doing the same work in staff positions would be in the bargaining unit and, most dramatically, while persons employed, in the future, to occupy the very same positions as the positions in dispute, would become part of the bargaining unit if the Ministry, as it says it might well, chooses to expressly appoint them to their positions under section 6, 7 or 8 of the P.S.A.

Counsel notes that for the employees in the small claims salary courts all the salaries are matched to the public service rates, as set out in the agreed facts, although none is in the classified service. The Ministry also assigns these employees to the equivalent of the clerical services category under the collective agreement and is gradually increasing their terms and conditions of employment to bring them in line with those acknowledged to be in the public service. Counsel argues that these employees are or must be deemed to be also in the Public Service and covered by the OPSEU collective agreement.

We note that the Union's arguments were made applicable to all of the employees in the small claim courts, i.e. the clerks and bailiffs, deputy clerks and bailiffs and staff of the fee courts as well as the salary courts.

#### IV. SUBMISSIONS OF THE MINISTRY:

Counsel for the Ministry observes that pursuant to Regulation 232 under C.E.C.B.A., which establishes certain bargaining units for the public service and certain employee organizations as the exclusive bargaining agents for employees in those

bargaining units, it is clear that OPSEU is not intended to hold representation rights for all Crown employees. As set out in section 11 of Regulation 232, its rights extend only to persons who are public servants.

Counsel for the Ministry argues that a finding by the Tribunal that a group of employees are Crown employees does not necessarily determine whether they are also public servants or which employee organization holds their representation rights. Counsel maintains that there is a practical effect to a finding of the Tribunal that employees are Crown employees, even where no employee organization is designated by the Regulations as having bargaining rights. Counsel submits that one or more employee organizations may then apply for representation rights for those Crown employees and, if successful, oblige the Crown to bargain with it in respect of those employees.

Counsel for the Ministry describes the public service as being divided into two categories: the classified and unclassified service. She notes that the classified service, as defined in section 1(b) of the Public Service Act is that "part of the public service to which civil servants are appointed. A "civil servant", she notes, is defined in section 1(a) of the P.S.A. as meaning "a person appointed to the service of the Crown by the Lieutenant Governor in Council on the certificate of the Commission or by the Commission" (emphasis added). She maintains that the appointment referred to in the definition of a "civil servant" is restricted to an appointment under section 6 or 7 of the P.S.A.

For the second portion of the public service, the unclassified service, counsel for the Ministry notes that it is defined in section 1(i) of the P.S.A. as meaning that "part of the public service that is composed of positions to which persons are appointed



by a minister under this Act" (emphasis added). Of importance to the matter at hand, she argues that the appointment referred to in the definition of unclassified service is, and is only, an appointment under section 8 of the P.S.A.

Counsel for the Ministry emphasizes that it is undisputed that none of the employees in question has been expressly appointed under section 6, 7 or 8 of the P.S.A. She comments, moreover, that the Small Claims Court clerks and bailiffs and their deputies are appointed under the C. of J. Act, as opposed to the P.S.A. She further comments that other staff of the Small Claims Courts are hired by the clerks and bailiffs, and not by the Minister and, therefore, fall further outside the scope of appointment to the unclassified service. Counsel observes that the court reporters and court interpreters are hired on a fee for service basis and not appointed under the P.S.A. Counsel argues that because none of the employees was actually appointed under sections 6, 7 or 8 of the P.S.A., they are not public servants and thus do not fall within OPSEU's bargaining unit as set out in section 11 of Reg. 232 made under C.E.C.B.A.

Counsel for the Ministry further argues that there has not been even substantial compliance with the appointment procedures under section 8 of the P.S.A. sufficient to permit the employees in dispute to come within the definition of "public servant". Counsel argues that counsel for OPSEU mischaracterized the situation when she, according to counsel for the Ministry, described the appointment procedure under section 8 of the P.S.A. as simply the "initialling of a contract by someone in personnel" and a "mere technical requirement" rather than the substantive essence of an appointment to the unclassified service. Counsel for the Ministry maintains that the procedure under section 8 is not a mere technicality. She notes that the personnel

officer involved in the section 8 appointment to the unclassified service ensures that the branch has the allocation of salary dollars and that the hours the employee will work make him suitable for a section 8 appointment, having regard to the detailed stipulations in section 6 of Regulation 881, set out above. Counsel disputes the suggestion of OPSEU that the fact of the employment relationship together with the knowledge of "this situation" by the Deputy Attorney General and the Attorney General constitutes sufficient compliance with section 8 to constitute an appointment under the P.S.A.

On the basis of the foregoing, the Ministry argues that there must be actual compliance with the appointment process under section 6, 7 or 8 of the P.S.A. for employees to be public servants and that, accordingly, the employees in question do not carry the status of public servants.

With respect to the argument of OPSEU based on section 94 of the C. of J. Act that when the Ministry considers it necessary to employ "[c]ourt administrators, court reporters, interpreters, translators and such other employees" it is stipulated that that be done by appointment under the P.S.A., counsel for the Ministry argues that in addition to authority under the P.S.A., the Crown has and continues to exercise a pre-existing common law power to hire. Counsel argues that pursuant to section 94 of the C. of J. Act, the Crown may make its appointments "under the Public Service Act" but maintains that it is not required to do so. Counsel argues that if section 94 was intended to take away a pre-existing right to hire, it would have done so expressly.

By pointing to sections 86(4) and 87(1)(g) of the C. of J. Act, counsel for the Ministry further disputes the suggestion of the Union that the Ministry does not have

power to employ Small Claims Court clerks and bailiffs apart from under the P.S.A. Section 86(4) of the C. of J. Act does not refer to appointment under the P.S.A. for clerks and bailiffs of the Provincial Court (Civil Division) (who are the persons in dispute) while it does do so under section 86(1) for clerks of the Provincial Court (Criminal and Family Divisions). Moreover, section 87(1)(g) speaks about the Lieutenant Governor in Council making regulations for the retention of fees by clerks and bailiffs of the Provincial Court (Civil Division) "who are not civil servants under the Public Service Act" and designating areas where clerks and bailiffs of the Provincial Court (Civil Division) "may be appointed to a position as a civil servant under [the P.S.A.]". Counsel argues that the effect of section 86 and 87(1)(g) read together is that clerks and bailiffs may be appointed by the Lieutenant Governor in Council under the C. of J. Act and that there clearly has been no illegal exercise of power with respect to clerks and bailiffs.

With respect to the submission of the Union that the Tribunal should deem the employees to be public servants, notwithstanding the lack of formal appointment as such, counsel for the Ministry argues that the Tribunal is without jurisdiction to do so. Counsel for the Ministry disputes that Re Beresford, supra, supports the request of the Union that the Tribunal deem the employees in issue to be public servants. Counsel emphasizes that in Re Beresford the grievor was already appointed to the public service and that the question was whether the appointment had been made to the right category i.e. the unclassified service. Counsel notes that in Re Beresford/Milley, the supplementary decision on remedy, the G.S.B. declined to itself appoint the grievors to the classified service or to deem their appointments as such notwithstanding that it had found that their appointments to the unclassified service had been improper. Counsel argues that there is an even greater barrier to the requested deemed appointment in the



present case than in Re Beresford/Milley because there at least the grievors had already been appointed to the public service.

Counsel for the Ministry distinguishes the Supreme Court of Canada decisions in Dore v. Canada and Canada (A-G) v. Brault relied on by the Union. Counsel emphasizes that in those cases, unlike in the instant matter, the employees in question had already been appointed to the public service and that the issue was whether a new assignment of duties within the public service created new positions to which particular rights and obligations would attach. Regarding the Syndicat General du Cinema case of the Federal Court of Appeal relied on by the Union, counsel for the Ministry emphasizes that there the scope of the public service was defined by the existence of positions. In contrast, counsel argues, the P.S.A. defines a public servant as a "person appointed under this Act" and stipulates that public service has a corresponding meaning. The Ministry relies on Re Canada (Procureur general) to argue that being a public servant requires the express appointment of the person.

#### V. SUBMISSIONS OF O.U.C.R.:

Counsel for O.U.C.R. argues that the freelance court reporters are not public servants and, therefore, are not members of OPSEU's bargaining unit because they have not been appointed to the public service under P.S.A. He maintains that there are only three possible methods of appointment under the P.S.A. (section 6, 7 and 8) and that none has occurred in respect of the freelance court reporters in dispute. Counsel acknowledges that section 94 of the C. of J. Act allows for the appointment of court reporters under the P.S.A. and concedes that most court reporters are so appointed and,



thus, are represented by OPSEU. Counsel maintains, however, that section 94 does not require appointment under the P.S.A. and that such has not been done in respect of the freelance court reporters in dispute.

## VI. DECISION RE COURT REPORTERS AND COURT INTERPRETERS:

The freelance court reporters and court interpreters who are involved in this application perform duties, subject to the terms and conditions outlined in the Agreed Facts, identical to those performed by the staff court reporters and staff court interpreters who the Ministry has always acknowledged are employees appointed to the classified civil service pursuant to the provisions of sections 4, 6 and 7 of the P.S.A., and thus fall within OPSEU's bargaining unit.

The reason the Ministry argues that the freelance court reporters and regular and casual court interpreters are not members of OPSEU's bargaining unit is because, in its submission, they are not public servants and thus do not fall within the scope clause of the bargaining unit which in section 11 of Regulation 232 is defined as "[a]ll" public servants ...". It is not suggested that the court reporters and court interpreters should not be a part of the bargaining unit because they don't share a community of interest with the other members. It would be difficult to advance such a position since the freelance court reporters and court interpreters perform the same functions as the staff court reporters and staff court interpreters who are an acknowledged part of the bargaining unit. Moreover, the freelance court reporters fill in for the staff court reporters on occasions of illness, vacation or excessive workload. They thus intermingle

with the staff court reporters. It is readily apparent that from the standpoint of the work they perform, the freelance court reporters and regular and casual court interpreters would form an appropriate part of the bargaining unit. The issue, though, is whether they are in fact part of the unit.

Nor is it suggested by the Ministry that they should be excluded because of any inherent disqualification as would be the case if they were independent contractors as originally had been argued by the Ministry. Moreover, they are not disqualified under the express exclusions in either sub clause (a) or (b) of the description of the bargaining unit:

11. All public servants other than,

- (a) the persons who are not employees within the meaning of clause 1(1)(f) of the Act; ...
- (b) the persons in the classifications or positions set out in column 2 of schedule 2, ...

[emphasis added]

The freelance court reporters and regular and casual court interpreters do not fall within the above-described excluded classifications or positions and thus, putting aside the issue of their status as public servants, would form an appropriate part of the bargaining unit. Moreover, it is not disputed that they are employed in "the service of the Crown" for the purposes of the definition of "public servant".

The only basis the Ministry offers to argue that the freelance court reporters and regular and casual court interpreters are not public servants and thus are not members of the bargaining unit is that they were not formally appointed to their positions of employment under sections 6, 7 or 8 of the P.S.A.

It is undisputed and acknowledged in the Agreed Facts that the reason the freelance court reporters and regular and casual court interpreters were not expressly appointed to their positions under section 6, 7 or 8 of the P.S.A. is because they were not considered to be employees at the time they were hired. As stipulated in the Agreed Facts and re-iterated in its verbal submissions, the Ministry simply did not give consideration to invoking the procedures it uses for appointing employees to the public service because, and, we conclude, only because, they were not considered by the Ministry to be employees. Apart from simply not having done it at the time of their hire, there is no impediment raised by the Ministry to the appropriateness of appointing the freelance court reporters and regular and casual court interpreters under section 6, 7 or 8 of the P.S.A.

The Ministry has acknowledged that in the future, now that the status of these persons has been established to be that of Crown employees and not independent contractor, persons hired into these positions might well be appointed under sections 6, 7 or 8 of the P.S.A., in which case they would fall directly into the bargaining unit.

It would be quite anomalous if persons hired subsequent to the Tribunal's finding of Crown employee status into the positions held by the employees in dispute are appointed under sections 6, 7 or 8 of the P.S.A. and thus become an acknowledged part of the bargaining unit while the current incumbents to those very positions are left out simply

because when they were hired the Ministry erroneously (albeit in good faith) did not consider them to be Crown employees.

Does the C.E.C.B.A. anticipate that through its own decision of choosing to or not to appoint the employees under the procedures set out in section 6, 7 or 8 of the P.S.A., the Ministry will have sole control over whether Crown employees employed in the service of the Crown, who would otherwise form an appropriate part of the bargaining unit, will actually become part of the designated bargaining unit? Could the Ministry choose, for example, to put every other freelance court reporter or court interpreter in the bargaining unit and keep every other one out simply by declining to expressly appoint every other such employee under the procedures set out in section 6, 7 or 8 of the P.S.A.? Such an arbitrary result is clearly not the intention of the Legislature and is not conducive to sound labour relations. Yet it is the potential result of the position taken by the Ministry in this matter.

Looking at the language of the various pieces of legislation advanced by the parties, and having regard to the submissions of the parties, the following factors and findings come to bear on the determination of whether the freelance court reporters and regular and casual court interpreters are public servants and fall within the bargaining unit:

- a. The bargaining unit is comprised of "all public servants" other than persons who are not employees within the meaning of clause 1(1)(f) of C.E.C.B.A. and persons in specified excluded classifications.



- b. The freelance court reporters and court interpreters are employees within the meaning of clause 1(1)(f) of the Act and do not fall within the excluded classifications.
- c. They are, therefore, part of the bargaining unit if they further fall within the scope of the clause, "all public servants" in the bargaining unit description, i.e. if they are public servants.
- d. "Public servant" in C.E.C.B.A. is defined in section 1(1)(m) as follows: "a public servant as defined in the Public Service Act and 'public service' has a corresponding meaning".
- e. "Public servant" is defined in the P.S.A., section 1(g), as a "person appointed under this Act to the service of the Crown by the Lieutenant Governor in Council, by the Commission or by a minister, and 'public service' has a corresponding meaning".
- f. The public service then is composed of persons appointed under the P.S.A. to the service of the Crown by, among others, a minister.
- g. There are two defined parts of the public service:
  - 1. the classified service, and
  - 2. the unclassified service.
- h. The classified service is defined in section 1(b) of the P.S.A. as the "part of the public service to which civil servants are appointed".

- i. A civil servant is defined in section 1(a) of the P.S.A. as a "person appointed to the service of the Crown by the Lieutenant Governor in Council on the certificate of the Commission or by the Commission, and 'civil service' has a corresponding meaning".
- j. It is agreed between the parties that the staff court reporters and staff court interpreters are part of the classified service. They fall within the bargaining unit and are subject to the relevant collective agreement. Presumably, then, they were appointed to the service of the Crown by or on the certificate of the Commission. The details of their appointments are not before the Tribunal.
- k. It is acknowledged that appointments to the classified service are made pursuant to sections 6 and 7 of the P.S.A.
- l. The second defined part of the public service is the unclassified service. The unclassified service is defined in section 1(i) of the P.S.A. as the "part of the public service that is composed of positions to which persons are appointed by a minister under this Act" (emphasis added).
- m. Section 8(1) of the P.S.A. stipulates that a "minister or any public servant who is designated in writing for the purpose by him may appoint for a period of not more than one year on the first appointment and for any period on any subsequent appointment a person to a position in the unclassified service in any Ministry over which he presides".

n. Section 8(2) of the P.S.A. stipulates that "[a]ny appointment made by a designee under subsection (1) shall be deemed to have been made by his minister".

o. Re the hiring process for freelance court reporters:

1. The freelance court reporters are provided or hired by the Manager of Court Reporters; that responsibility has been designated by the Attorney General. Initially, the Inspector of Legal Offices arranged for the provision of freelance court reporters on an *ad hoc* basis. More recently, however, the Manager was given that responsibility permanently.
2. Suitable candidates for freelance reporting are identified locally, either through advertising or through administration identification of potential candidates. Many of the freelance reporters are solicited by the Ministry from graduates of the course at George Brown College.
3. After preliminary testing, full training and evaluation are provided by the Ministry. At the conclusion of a three to six month probationary period and successful completion of the reporters' certification program, a freelance reporter is considered fully qualified to carry out all reporting functions. A list of qualified and preferred freelance reporters is maintained

by the Manager. Qualified reporters are those who are approved for use by the Ministry; preferred reporters are those amongst the qualified reporters that the Ministry prefers to use.

4. The Tribunal concludes that given the provisions of section 8(2) of the P.S.A., (which provides that any appointment made under section 8(1) of the P.S.A. by a designee of a minister shall be deemed to have been made by the Minister), a hiring or appointment by the Manager of Reports is deemed to be a hiring or appointment by the Minister for the purposes of the P.S.A. Moreover, it is clear and essentially undisputed that the court reporters were appointed "to the service of the Crown".
5. Whether the procurement or hiring of the freelance court reporters by the Manager is an "[appointment] under this Act ..." within the further definition of "public servant", however, remains the outstanding question. If it is, though, the appointments would be deemed by the legislation to be appointments by the Minister for the reasons noted above.
6. The Tribunal further concludes on the basis of the facts and submissions that when the freelance court reporters are hired they are employed under clearly defined terms and conditions of employment. The clearly-defined terms of employment include such matters as (1) training, certification and progression, (2) the swearing of an oath, (3) availability requirements, (4) places



and hours of work and requests for temporary changes in work location, (5) duties and methods of work, including compliance with the manual of court reporting, (6) supervision in court and out of court, (7) remuneration, including rates of pay, transcript fees, mileage and accommodation allowance, (8) procedures respecting cancellation of proceedings, (9) allowable billable time as well as payment and invoicing procedures for time spent in court and on transcripts, (10) when and where transcripts may be typed, (11) printing charges and (12) sanctions for particular forms of deemed improper conduct.

p. Re the hiring process for court interpreters:

1. As set out in the Agreed Facts relevant to the Court Interpreters at p.26 of the employee status decision in Re Small Claims Court, the Attorney General has delegated authority for the administration of the Court, in part, to the Court Services branch of the Court Administration Division of the Ministry of the Attorney General, including interpreter services. The coordinator of Court Interpretation and Translation Services is directly responsible for interpreter services.
2. In November of 1985, Interpretation Services introduced a system for registration and testing of all existing and future interpreters, including staff interpreters and the regular and casual interpreters in dispute.

3. The Agreed Facts indicate that the Court Interpreter's Office is responsible to the civil service for appointing the staff interpreters. They are appointed to the classified service under section 6 and 7 of the P.S.A. and fall within O.P.S.E.U.'s bargaining unit.
4. The Court Interpreters Office is also involved in the provision of the regular and casual court interpreters. They submit an application to the Coordinator, Court Interpretation and Translation Services and are then tested. If successful they are registered and subsequently scheduled in accordance with need and availability. The Ministry provides all interpreters, both staff and the ones in dispute, with an office in all Metro Toronto court locations.
5. The scheduling of all the interpreting services is shared between the Court administration and the regular interpreters. Requests for interpreters are made to the Court Clerk's Office, which in turn forwards the request in writing to the Court Interpreter's Office. Every month two or three regular interpreters schedule regular interpreters to trials; when necessary they contact casual interpreters. The regular and casual interpreters are paid an average hourly rate which is much lower than the basic hourly wage portion of the remuneration received by staff reporters.

6. On the basis of the facts and having regard to the submissions of the parties, the Tribunal concludes that the hiring of the court interpreters in dispute is done through the Court Services branch of the Court Administration Division of the Ministry of the Attorney General on the delegated authority of the Attorney General. Pursuant to the provisions of section 8(2) of the P.S.A., the Tribunal concludes, thereby, that the hiring of the court interpreters is an appointment by the Minister. Moreover, it is clear and essentially undisputed that they are employed in "the service of the Crown".
7. Whether the court interpreters have been "appointed under [the P.S.A.] within the further definition of "public servant" remains the outstanding question. If they have, though, their appointments would be deemed by the legislation to be appointments by the Minister, for the reasons noted above.
8. The Tribunal further concludes on the basis of the facts and submissions that when the regular and casual interpreters are hired they are employed under clearly-defined terms of employment respecting such matters as (1) testing and registration, (2) the swearing of an oath, (3) place of work, (4) hours of work, (5) conditions on availability, (6) temporary assignment to other court locations, (7) supervision in court, (8) rates of pay, invoice procedures, office space, and (9) sanctions for particular forms of deemed improper conduct.

- q. Neither the freelance court reporters nor the regular or casual interpreters have been expressly appointed to the classified service under sections 6 or 7 of the P.S.A. Moreover, in the instant circumstances, we are not prepared to deem that they have been so appointed or to conclude that there has been sufficient substantial compliance to constitute an appointment to the classified service.
  
- r. The question then is whether the freelance court reporters and regular and casual interpreters have been appointed or should be deemed to have been appointed to the unclassified service, or whether, even if not, they, in the circumstances, have been "appointed under [the P.S.A.] to the service of the Crown" within the meaning of the definition of "public servant" in C.E.C.B.A.
  
- s. The unclassified service is described in section 6 of Regulation 118 to the P.S.A. as consisting of employees under individual contracts in which the terms of employment are set out and divided into three groups: Group 1 includes employees who are (1) employed on projects of a non-recurring kind, (2) in a professional or special capacity, (3) on a temporary assignment, (4) for fewer than 14 hours per week or (5) during the school vacation period. Group 2 includes employees on projects of a recurring kind (1) for fewer than twelve consecutive months with certain stipulated hours or (2) for fewer than eight consecutive weeks with certain stipulated hours. Group 3 consists of employees appointed on a seasonal basis for certain stipulated periods of time and hours of work.



- t. The parties did not suggest that the court reporters and court interpreters in dispute would not fit within the type of positions described for the unclassified service. Instead, the parties focussed their argument on the actual appointment process under section 8 of the P.S.A. The Tribunal concludes on the basis of the facts and submissions that if properly appointed the employees in dispute would have been properly suited to the unclassified service, i.e. would have fit within one of the three defined groups.
- u. What was asserted by the Ministry was not that they would not fit within one of the three groups of the unclassified service, but rather that they were not "appointed" pursuant to section 8 (1), i.e. in the manner normally used for the unclassified service.
- v. Section 6 of Regulation 118 respecting the unclassified service refers to "employees who are employed under individual contracts in which the terms of employment are set out ...".
- w. The parties in their Agreed Facts included a document entitled the "PUBLIC SERVICE ACT CONTRACT FOR EMPLOYMENT Unclassified staff - Group 1". They stipulated in their Agreed Facts that employees intended to be unclassified public servants are hired pursuant to contracts of employment in a form "similar to" Exhibit #1.

- x. The parties then set out in their Agreed Facts as supplemented by further oral agreement at the hearing, the process followed by the Ministry when a typical employee is hired under one of these contracts. The employee enters into the Public Service Contract of Employment. The contract then goes to a person in personnel delegated in writing by the Minister to perform the function. That person checks details of salary, hours of work and classification. If everything is in order, the person initials the contract to signify approval. A copy of the approved contract is sent to the employee and documentation is created by personnel for payroll purposes. When this process is followed, it is undisputed that the person is "appointed" under the P.S.A. for the purposes of the definition of public servant.
  
- y. After carefully reviewing the facts and the submissions of the parties, the Tribunal, drawing on its conclusion as set out in paragraph o(7) above for the freelance court reporters and paragraph p(8) above for the regular and casual interpreters, is satisfied that the freelance court reporters and regular and casual court interpreters in dispute were "employed under individual contracts in which the terms of employment are set out" within the meaning of section 6 of Regulation 118. They were not expressly employed under the document entitled "The Public Service Act Contract for Employment (unclassified staff - group 1)" submitted as Exhibit #1. That, however, does not negate the Tribunal's conclusion that they were employed under "individual contracts" within the meaning of section 6 of the Regulations.

- z. The precise details of their actual hirings were not the subject of the facts or submissions. It is perfectly clear, however, that whatever the exact form of the documentation used by the Ministry when it hired the individuals in dispute, they entered into individual contracts with the Ministry to provide their services in the service of the Crown under mutually-understood and well-defined terms and conditions of employment, as detailed in the Agreed Facts and in Re Court Reporters and Re Small Claims Court Employees. Although all of the terms and conditions of employment may not have been written down in a single contract document, many were in writing at various locations (legislation, regulations, manuals); they were clearly understood and well defined.
- aa. Looking back to the wording of section 8(1) of the P.S.A. respecting appointments to the unclassified service, we note that whether any or all of the court reporters or court interpreters in dispute were employed initially for a "period of not more than one year on the first appointment" was not the subject of submissions by the parties. Moreover, any defect in the length of appointment which is controllable by the Ministry cannot vitiate the status of the freelance court reporters and regular and casual court interpreters as public servants. To do so would place form over substance and would enable the Ministry to circumvent the P.S.A. in a manner similar to that which the Supreme Court of Canada stated would be inappropriate in Dore v. Canada and Canada (A-G) v. Brault.
- bb. Section 6 of Regulation 118 provides that the unclassified service consists of employees employed in the service of the Crown under individual

contracts in which the terms of employment are set out. Is being employed in the service of the Crown under individual contracts in which terms of employment are set out, within the meaning of section 6 of Regulation 118, as we have concluded was the case for the court reporters and court interpreters in dispute, an "appointment" to the unclassified service, notwithstanding that the exact form of contract that is normally used was not used and even though the precise personnel checks that are normally performed by personnel regarding hours of work, salary and classification were not formally done in the routine manner?

- cc. The unclassified service is defined as "that part of the public service that is composed of positions to which persons are appointed by a minister under this Act".
- dd. This definition does not stipulate that the appointment must be done through a specific form of contract or that personnel must carry out certain checks. Nor do the Regulations. The Regulations simply refer to "individual contracts in which the terms of employment are set out".
- ee. Section 94 of the C. of J. Act stipulates that court reporters and interpreters and such other employees as are considered necessary for the administration of the courts "may be appointed under the P.S.A.". Section 3 of the M. of the A.-G. Act provides that such officers, clerks and servants "may be appointed under the P.S.A." as are required from time to time for the proper conduct of the business of the Ministry, which includes the administration of the courts. The legislation does not expressly refer to



any form of appointment for court reporters and court interpreters other than appointment under the P.S.A.

- ff. It may well be that the Ministry is not required to appoint all the persons it considers necessary for the administration of the courts under the P.S.A. For example, any such persons who were in fact independent contractors would not be so appointed. The situation is somewhat different, however, for the court reporters and court interpreters in dispute, i.e. for persons 1) who are Crown employees, and not independent contractors; 2) who the Ministry acknowledges are appropriate in all respects for appointment under the P.S.A. if it chooses to do so; 3) who occupy positions that the Ministry states it may well fill in the future by appointments under the P.S.A. and 4) who perform the same work as, and intermingle with, persons who are already included in the bargaining unit.
- gg. The ramification of concluding that the hiring of these freelance court reporters and court interpreters is not an appointment under the P.S.A. is that notwithstanding that they are Crown employees employed in the service of the Crown, they would be left out of the bargaining unit designated for such persons. Moreover, there is not another bargaining unit designated under the regulations for such persons who are Crown employees appointed to the service of the Crown. The person would be left out of the bargaining unit which includes their staff counterparts who perform the same function and which will include persons who are subsequently hired into their precise positions if the Ministry chooses to expressly appoint them under the P.S.A., as it says it may well do. The

adverse labour relations consequences of this kind of split among such similar employees are significant.

- hh. The Tribunal is satisfied that the legislature did not intend that the composition of the bargaining unit could be determined by the Ministry's choice of whether to formally appoint someone under the P.S.A. It is not within the intention of C.E.C.B.A. that the Ministry could, for example, arbitrarily decide to appoint every other freelance court reporter under the P.S.A., granting all the rights and benefits that flow from public servant status, and leave every odd one out. Yet such is the potential result of the Ministry's position in this matter. Inclusions in the bargaining unit, we find, must be determined by what the Ministry did in fact with respect to the appointment of the freelance court reporters and regular and casual court interpreters and not what it intended to do or chose to do. In drawing this conclusion, we give substantial weight to the Supreme Court of Canada decisions in Dore v. Canada and Canada (A-G) v. Brault and the decision of the Federal Court of Appeal in Syndicate General du Cinema.
- ii. Having regard to (1) the language of both the C. of J. Act and the Min. of the A-G Act which expressly provides for the appointment of court reporters and court interpreters under the P.S.A., (2) the absence of a reference in the relevant legislation to any other type of anticipated appointment and (3) the serious implications of these Crown employee court reporters and court interpreters not being appointed under the P.S.A. as discussed above, the Tribunal is satisfied that there is a presumption in

the legislation that once persons who are Crown employees are deemed necessary for the administration of the courts, and are hired in the service of the Crown by the Ministry, their hirings will constitute appointments under the P.S.A., absent a compelling explanation to the contrary.

- jj. The explanation provided by the Ministry for the court reporters and court interpreters in dispute not being "appointed" under the P.S.A. is that the Ministry did not realize they were employees at the time it hired them and considered them to be independent contractors instead. As a result, according to the Ministry, it just did not think about following the steps it normally takes when it intends to appoint someone to the classified or unclassified service.
- kk. Is the Ministry's failure to invoke the appointment process under P.S.A. for these employees for what was an understandable, yet invalid, reason sufficient to deprive these employees of the status of public servants with all the rights attendant thereon? Is it a "compelling explanation to the contrary"?
- ll. The Ministry's rationale constitutes the reason it did not knowingly appoint the persons in dispute to the classified or unclassified service. It is not a justification as to why it would not have expressly appointed some or all of them under the P.S.A. had it thought about it, as it would have had it realized at the time that the court reporters and court interpreters are Crown employees. It is not a compelling explanation as to

why the appointments that did occur should not be regarded as appointments under the P.S.A. or should be considered anything other than appointments under the P.S.A. The Tribunal is satisfied on the balance of probabilities that if the Ministry had realized at the time they were hired that the freelance court reporters and regular and casual court interpreters were Crown employees it would have expressly appointed them in the normal way under the P.S.A. to either the classified or unclassified service. The single reason it did not is because it erroneously thought they were independent contractors.

mm. On the basis of having been employed under individual contracts of employment on the authority of the Minister, the Tribunal concludes that the freelance court reporters and court interpreters were appointed to the unclassified service pursuant to section 8 of the P.S.A. and section 6 of Regulation 881 under the P.S.A. Accordingly, they are "[persons] appointed under [the P.S.A.] to the service of the Crown by ... a minister ..." and thus are public servants within the meaning of both the P.S.A. and C.E.C.B.A.

nn. Because the freelance court reporters and court interpreters are public servants they fall within the Union's bargaining unit.

oo. In the event that the Tribunal is incorrect in finding that through the above-described process the freelance court reporters and regular and casual court interpreters were in fact appointed to the unclassified service,



the Tribunal concludes that form must give way to substance and it deems that they were so appointed.

pp. The Tribunal does not in the circumstances of this matter deem that any of the freelance court reporters or court interpreters have been appointed to the classified service even though it may well be that that is where they would have been appointed had the Ministry been aware of their status as Crown employees upon hiring. The Tribunal is mindful of the posting procedures and other features of appointment to the classified service which cannot lightly be set aside.

qq. In the further event that no appointments were made or can be deemed to have been made to the unclassified service, we conclude that the freelance court reporters and court interpreters were, more generally, "appointed under [the P.S.A.] to the service of the Crown by . . . a minister" and thus fall in any event within the general definition of public servant in the P.S.A. and C.E.C.B.A. Although the public service is broadly composed of the classified and unclassified service, the definition of "public servant" does not expressly circumscribe the appointment in that manner.

rr. Whether the public service consists of any group other than the classified and unclassified service was addressed by the G.S.B. in Re Beresford/Milley, supra, when the G.S.B. reconvened to determine the issue of remedy once it had been decided that the grievors, Beresford and Milley, had been improperly appointed to the unclassified service because they were not appointed to any position defined in the three groups

referred to in section 6 of Regulation 118 of the P.S.A. The Union had argued if they had not been properly appointed to the unclassified service, they must be deemed to have been appointed to the classified service since the public service, according to the Union, consists of only two types of public servants, classified and unclassified.

- ss. The G.S.B in Re Beresford/Milley held, however, that notwithstanding that they were not part of the unclassified service, they could not be deemed to be part of the classified service because such appointments, it considered, were in the exclusive domain of the employer. Moreover, classified positions are subject to posting provisions under the collective agreement and involve the rights of third parties. The G.S.B. commented that the grievors might never have been appointed to the classified positions if they had been posted.
- tt. What is of importance to the matter at hand is that the G.S.B. in Re Beresford/Milley still considered grievors Beresford and Milley to be public servants with rights under the collective agreement even though their purported appointments to the unclassified service had been nullified and it was not considered that they had been appointed to positions in the classified service. The G.S.B. stated that since the collective agreement did not contemplate persons improperly appointed their rights under the collective agreement had to be inferred. That was done and the grievors were compensated accordingly.

- uu. Although they were not properly appointed to either the classified service or unclassified service they were still considered part of the bargaining unit with rights (albeit rights that had to be inferred) under the collective agreement. Put another way, they were still considered public servants. If they were still part of the bargaining unit, they, by definition, still had to be public servants.
- vv. Having regard to the factors listed above and supported by the finding of the G.S.B. in Re Beresford/Milley that the grievors remained members of the bargaining unit with rights under the collective agreement, i.e. that they remained public servants, notwithstanding that they had not been appointed to either the classified or unclassified service, the Tribunal concludes that through the hiring process that did occur the freelance court reporters and regular and casual interpreters have been "appointed under [the P.S.A.] to the service of the Crown ... by a Minister" and are thus public servants.

## VII. DECISION RE CLERKS AND BAILIFFS:

The Tribunal, on the basis of the facts and submissions, makes the following findings respecting the clerks and bailiffs:

- a. The clerks and bailiffs are appointed to the service of the Crown. They perform and/or supervise the daily operation of the Provincial Court (Civil Division) and in so doing carry out, in part, the responsibility of the Attorney General as set out in section 91 of the C. of J. Act to

superintend all matters connected with the administration of the Provincial Court (Civil Division) or Small Claims Court.

- b. The appointment of the clerks and bailiffs for each division of the Provincial Court (Civil Division) by the Lieutenant Governor in Council is required by section 86 of the C. of J. Act.
- c. The clerks and bailiffs are formally appointed to their positions by the Lieutenant Governor in Council by Order in Council. They are chosen by the Director or his staff who is the person to whom the Attorney General has delegated authority for administering the Small Claims Courts. The formal appointment is made by the Lieutenant Governor in Council and the effective appointment is made by the Minister. Each clerk is put in charge of a court office in one of the 119 territorial divisions of the court and each bailiff is in charge of the service and enforcement of processes within that division.
- d. It is clear and essentially undisputed that the clerks and bailiffs in issue were appointed "to the service of the Crown by the Lieutenant Governor in Council, ... or by a Minister..." within the meaning of the definition of "public servant" in section 1(g) of the P.S.A.. The critical question in determining whether they are public servants and members of the bargaining unit is whether they were "appointed under this [P.S.A.] Act" within the further definition of "public servant" in the P.S.A.



- e. Section 94 of the C. of J. Act provides that "court administrators ... and such other employees as are considered necessary" may be appointed under the P.S.A.

The clerks and bailiffs, we find, are either "court administrators" or "such other employees" who are considered necessary and thus may be appointed under the P.S.A.

- f. The Min. of the A.-G. Act provides in section 3(2) that "[s]uch officers, clerks and servants may be appointed under the Public Service Act as are required from time-to-time for the proper conduct of the business of the Ministry". The Tribunal is satisfied that the clerks and bailiffs fall within this description as persons required for the proper conduct of the business of the Ministry and, thus, pursuant to the Min. of the A.-G. Act, as well, may be appointed under the P.S.A.

- g. The Tribunal was not made aware of any provision, legislative or otherwise, which contemplates the appointment of clerks and bailiffs under any other Act.

- h. The labour relations consequences of the clerks and bailiffs not being appointed under the P.S.A. are significant. There is not another bargaining unit designated under the regulations for persons who are Crown employees appointed to the service of the Crown, as are the clerks and bailiffs. Absent the creation of a new bargaining unit pursuant to a fresh application for certification, they would be left in limbo without organized

representation. Yet, if in the future, now that it is known that these persons are Crown employees, the Ministry appoints future clerks and bailiffs under the P.S.A., as it has said it might well, then those employees would be public servants and fall within OPSEU's bargaining unit. There would then be two groups of Crown employees performing exactly the same work directly for the Crown with one segment in OPSEU's bargaining unit and one segment left out. There is no sound labour relations reason why the current clerks and bailiffs should be left in limbo, simply because at the time they were appointed, they were mistakenly thought by the Ministry to be independent contractors and not employees. In fact, it would be a substantial strain to sound labour relations to have persons who perform the same work on the same basis for the same employer split in respect of their inclusion in the bargaining unit primarily, if not solely, because of the timing of their appointments to the service of the Crown.

Moreover, the Crown is not bound by parts of the Employment Standards Act and there are substantial provisions for public servants in the P.S.A.

- i. Given 1) the legislative provision for clerks and bailiffs to be appointed under the P.S.A., 2) the adverse impact on the sound labour relations of the parties of a finding that they are not appointed under the P.S.A., and 3) the absence of any other specific form of appointment contemplated by the legislation, particularly for persons who are Crown employees, the Tribunal concludes, as it did for the freelance court reporters and regular and casual court interpreters, that in the absence of a compelling

explanation to the contrary, the legislation presumes and intends that clerks and bailiffs who are found necessary for the business of the Ministry and who are Crown employees appointed to the service of the Crown (as are the clerks and bailiffs under review), will be appointed under the P.S.A.

- j. In the instant circumstances, the Ministry did not provide any reason why the clerks and bailiffs should not be appointed under the P.S.A. Nor did it assert that any other specific form of appointment would have been more appropriate or was in fact intended. The sole argument of the Ministry is that it did not contemplate the appointment of the clerks and bailiffs under the P.S.A. because it did not realize they were Crown employees. It thought, instead, that they were independent contractors. Having regard to the facts and submissions, we find, on balance, that if the Ministry had known at the time of their appointments that the clerks and bailiffs were in fact Crown employees it would have knowingly appointed them under the Public Service Act under either section 6, 7 or 8. The mere failure to contemplate appointment under the P.S.A. is not, in the instant circumstances, a sufficiently compelling explanation to displace the presumption in the legislation that clerks and bailiffs who are Crown employees appointed to the service of the Crown (as are those in dispute are) would be appointed under the P.S.A.
- k. Section 8(1) of the P.S.A. which is the provision under which the parties agree appointments are normally made to the unclassified service, stipulates that "[a] minister ... may appoint for a period of not more than one year on

the first appointment and for any period on any subsequent appointment a person to a position in the unclassified service ..."

The P.S.A. does not in either section 8(1) or any other section of the P.S.A. or the related regulation, further stipulate that appointments to the unclassified service must be made pursuant to a particular form of contract. The Agreed facts indicate, though, that when appointments are knowingly made to the unclassified service the Ministry uses a contract of employment "in form similar to [that set out in item #7 of the Preamble of the Agreed Facts]".

The Tribunal concludes that the P.S.A. does not require that a particular form of contract must be used for an appointment to be found to be an appointment under the P.S.A. for the purposes of the definition of "public servant". Accordingly, the fact that the clerks and bailiffs were not appointed under a form of contract similar to that set out in the Preamble to the Agreed Facts does not negate a finding that they were appointed under the P.S.A.

1. The Tribunal does not have before it the details of the length of the current or past appointments of the clerks and bailiffs in issue. It was not suggested by the Ministry in this matter, however, that the term of the appointments of the clerks and bailiffs were not in compliance with the dictates of section 8(1) of the P.S.A. and that such was a justification for concluding that the clerks and bailiffs were not appointed under the P.S.A. to the unclassified service.
- m. In any event, moreover, as found in respect of the court reporters and court interpreters, the Tribunal concludes that a deviation in the length of the



appointment from that set out in section 8(1) of the P.S.A. for appointments to the unclassified service ("a period of not more than one year on the first appointment and for any period on any subsequent appointment...") would not render invalid an otherwise valid appointment under the P.S.A. To find that a defect in the length of appointment voids an appointment under the P.S.A. would be to allow form to dominate substance and thwart the legislative purpose behind the P.S.A., something the Supreme Court of Canada held to be inappropriate in Dore v. Canada and Canada (A-G) v. Brault.

- n. In the result and in the absence of any suggestion to the contrary, the Tribunal concludes that the period of the appointments of the clerks and bailiffs is not out of line with the period set out in section 8(1). Even if it was, however, such would not be sufficient to vitiate the validity of the appointments of the clerks and bailiffs under the P.S.A.
- o. Regulation 881, section 6, under the P.S.A. describes the unclassified service. It states that the "unclassified service consists of employees who are employed under individual contracts in which the terms of employment are set out and is divided into [three described groups]".
- p. At the time of appointment, the term and conditions of employment for the clerks and bailiffs were well defined in respect of such matters as 1) duties they are required to perform and the procedures they are to follow in performing those duties, as expressly set out in a procedural manual published by the Ministry and the rules established by the Rules Committee of the Provincial Court (Civil Division), 2) the forms they are to use in the

performance of their work, 3) the fees and allowances payable, 4) bookkeeping requirements, 5) work location, 6) supervision and 7) sanctions that are applicable for failure to comply with the established standards and rules set by the Ministry in respect of their work.

- q. These terms of employment are not set out in an employment contract for each clerk and bailiff. They are contained, in part, in legislation, regulations and published manuals. They are well known and well understood for each clerk and bailiff.

It was not suggested by the Ministry that the clerks and bailiffs should not be considered appointed to the unclassified service because their contracts of employment did not fall within the scope of the description of the unclassified service in section 6 of Regulation 881. Nor did the Ministry suggest that the clerks and bailiffs would be inappropriate for the unclassified service because they would not fall within groups 1, 2 or 3.

- r. In the result, having regard to the description of the unclassified service in section 6 of Regulation 881, the clarity of the terms and conditions of their appointments and the absence of any submission that the clerks and bailiffs would not fit within groups 1, 2 or 3, the Tribunal concludes, on balance, that the clerks and bailiffs in dispute are part of the unclassified service because they are "employees who are employed under individual contracts in which the terms of employment are set out" and fall within either group 1, 2 or 3 within the meaning of section 6 of Regulation 881.

- s. As found by the Tribunal herein in respect of the court reporters and court interpreters, and consistent with the clear direction given by the Supreme Court of Canada in both Dore v. Canada and Canada (A-G) v. Brault, the determination of the status of employees of the Crown cannot be based on the intention of the Crown, but rather must be based on an assessment of the facts of what occurred.
- t. It is on the basis of an assessment of what in fact occurred with respect to the clerks and bailiffs that the Tribunal has drawn the conclusions it has, notwithstanding that the Crown did not intend to appoint or direct its mind to appointing the clerks and bailiffs under the P.S.A.
- u. Accordingly, we find that the clerks and bailiffs were appointed to the unclassified service pursuant to section 8(1) of the P.S.A., notwithstanding that the typical form of contract was not used and notwithstanding that the Ministry did not intend at the point of hire to appoint them under the P.S.A.
- v. In the event that the Tribunal is incorrect in its finding that the clerks and bailiffs were appointed under section 8 of the P.S.A. to the unclassified service, the Tribunal concludes, more generally, that they were in any event "persons appointed under [the P.S.A.] to the service of the Crown by the Lieutenant Governor in Council ... or by a minister ..." within the meaning of the general definition of "public servant" in section 1(g) of the P.S.A.
- w. As noted, section 94 of the C. of J. Act states that the clerks and bailiffs (who are employees considered necessary for the administration of the Courts

in Ontario pursuant to section 86(4) of the C. of J. Act) in the Provincial Court (Civil Division) may be appointed under the P.S.A. It does not require that they be appointed under the P.S.A. If they were in fact independent contractors and not Crown employees then they would not be appointed under the P.S.A.

- x. While section 94 of the C. of J. Act and section 3 of the Min. of the A.-G. At expressly provide that clerks and bailiffs who are considered necessary for the administration of the courts in Ontario and/or the business of the Ministry may be appointed under the P.S.A., it does not further stipulate that the only means by which they can be appointed under the P.S.A. is pursuant to the formal procedures established in sections 6, 7 and 8 of the P.S.A. Nor does the P.S.A. itself expressly stipulate that the only means by which a person can be appointed to the public service is through strict compliance with section 6, 7 or 8 of the P.S.A., even if that is the normally expected route. We note, for example, the G.S.B. decision in Re Beresford/Milley which found that the grievors who were not properly appointed to either the classified service or the unclassified service were still people with entitlements under the collective agreement and thus were still public servants which by definition means they were appointed under the P.S.A.
- y. Having regard to the foregoing and what we conclude is the intention of the legislature that in the absence of a compelling reason to the contrary such Crown employees appointed to the service of the Crown will be appointed under the P.S.A., the Tribunal concludes that the clerks and bailiffs were "appointed under [the P.S.A.] to the service of the Crown by



the Lieutenant Governor in Council ... or by a minister ..." within the meaning of the definition of 'public servant' under section 1(g) of the P.S.A., notwithstanding that they were not actually appointed in accordance with the procedures normally utilized in respect of sections 6, 7 or 8 of the P.S.A. for appointment to the classified and unclassified service.

- z. Accordingly, the Tribunal concludes that the clerks and bailiffs are public servants within the meaning of section 1(1)(m) of C.E.C.B.A. and that they fall within the scope of the O.P.S.E.U.'s bargaining unit.

#### VIII. DECISION RE DEPUTY CLERKS AND BAILIFFS:

- a. The deputy clerks and bailiffs who assist the clerks and bailiff are subject to approval by the Director. Once approved for appointment at that level, their names are forwarded to the Lieutenant Governor in Council for formal appointment. Just as with the clerks and bailiffs, the deputies work in accordance with rules established by the Rules Committee of the Provincial Court (Civil Division) and a Procedural Manual published by the Ministry. All of their essential terms and conditions of appointment are well defined.
- b. They are appointed to the service of the Crown, just as are the clerks and bailiffs.

- c. Pursuant to section 94 of the C. of J. Act and section 3 of the Min. of the A.-G. Act they may be appointed under the P.S.A.
- d. For the reasons set out in respect of the clerks and bailiffs, the Tribunal is satisfied that the Ministry would have expressly made their appointments under the P.S.A. had the Ministry known at the time of their hiring that they were Crown employees. Moreover, having regard to the Agreed Statement of Fact and the submissions of the parties, we conclude that in all likelihood, any future appointments will be knowingly, formally and directly made under the provisions of the P.S.A. now that it is clear that they are Crown employees. If they are, they are then, without dispute, public servants and members of the bargaining unit.
- e. There is no sound labour relations basis for having the current deputy clerks and bailiffs held in limbo, simply because when they were appointed it was not realized that they were Crown employees.
- f. For the reasons set out above for the clerks and bailiffs, the Tribunal concludes that the deputy clerks and bailiffs either were appointed in accordance with section 8 of the P.S.A. or, in any event, must be deemed to have been appointed under the P.S.A. for the purposes of the definition of "public servant" under section 1(g) of the P.S.A.
- g. The Tribunal therefore finds that the deputy clerks and bailiffs are "person[s] appointed under the [P.S.A.] to the service of the Crown by the

Lieutenant Governor in Council ... or by a minister ... and are therefore "public servants" within the meaning of section 1(g) of the P.S.A. and section 1(1)(m) of C.E.C.B.A.

- h. Accordingly, the deputy clerks and bailiffs fall within the scope of OPSEU's bargaining unit.

IX. DECISION ON EMPLOYEES IN THE SALARY COURT OFFICES OF THE SMALL CLAIMS COURT:

- a. There are no employees in the Small Claims Courts in classified civil service positions. The employees in the "Salary Court" offices, however, are paid salaries set by the Ministry to match public service rates. The Ministry of the Attorney General assigns the employees in the Salary Court offices to classifications equivalent to those in the public service and then guarantees they will receive the same rates. The "Salary Court" employees are assigned to the equivalent of the Clerical Services category under the current collective agreement between OPSEU and the Crown in Right of Ontario.
- b. In addition, the Ministry sets the other terms and conditions of employment by having the clerks and bailiffs administer their offices in accordance with the Ministry's Administration Manual. Even though the wages of the salary court office employees are the same as those in the collective agreement, their terms and conditions of employment are worse.

- c. New positions for the employees in Salary Court offices are filled by the Clerk only after getting approval from the Director. If the Director grants approval he also sets the classification and salary range.
- d. The Ministry has long intended to amalgamate the salary court offices into the public service.
- e. Section 94 of the C. of J. Act and section 3 of the Min. of the A-G. Act stipulates that these employees may be appointed under the P.S.A. For reasons set out in respect of the court reporters, court interpreters, clerks and bailiffs, we conclude that there is a presumption in the legislation that such Crown employees appointed to the service of the Crown will be appointed under the P.S.A. in the absence of a compelling explanation to the contrary.
- f. In its decision in Re Small Claims Court, the Tribunal concluded that the staff hired by the clerks and bailiffs are not the employees of the clerks and bailiffs themselves but rather are the employees of the Ministry.
- g. The Agreed Facts and the submissions of the parties make it clear that the reason the staff of the small claims courts have not been appointed under sections 6, 7 or 8 of the P.S.A. is because they were considered by the Ministry to be employees of clerks and bailiffs, as independent contractors, and not direct employees of the Ministry.



- h. The Tribunal concludes, on balance, that had the Ministry been aware at the time of their hiring that they were employees of the Ministry, they would have knowingly appointed them to their positions under sections 6, 7 or 8 of the P.S.A. The Tribunal further concludes on the basis of the facts and submissions that, in the ordinary course, any future employees hired into these positions would in all likelihood be knowingly directly and formally appointed under section 6, 7 or 8 of the P.S.A.
- i. This assessment of the Ministry's intentions are underscored by the Agreed Facts. As noted, the Minister assigns the employees of the salary court offices to classifications equivalent to those in the public service and guarantees that they will receive the same rate. They are further assigned to the equivalent of the clerical services category under the current collective agreement.
- j. Neither section 94 of the C. of J. Act, section 3 of the Min. of the A-G. Act nor the P.S.A. itself expressly states that the only means by which an appointment under the Act can be effected for the purposes of the definition of public servant is through section 6, 7 or 8 of the P.S.A. For the reasons set out in respect of the clerks and bailiffs we conclude that the appointment of the employees in the salary court offices were in fact appointments under section 6, 7 or 8 of the P.S.A. In the alternative, and, more generally, for the reasons also set out in respect of the court reporters, court interpreters and clerks and bailiffs, we conclude that the employees in the salary offices were "person[s] appointed under [the P.S.A.] to the service of the Crown by ... the minister ..." within the

meaning of the definition of "public servant" in section 1(g) of the P.S.A. and section 1(l)(m) of C.E.C.B.A.

**X. DECISION ON EMPLOYEES IN THE FEE COURTS:**

- a. In the Fee Courts, the clerks and bailiff themselves may hire staff to assist in the running of the court. Approval is not required from the Director, as it is for employees in the salary court offices.
- b. In Re Small Claims Court, the Tribunal concluded that the employees who are hired by the clerks and bailiffs are Crown employees. Once employed, they are required to perform their duties in conformance with the rules and procedures established by the Ministry, notwithstanding that it is the clerks and bailiffs themselves who set the salaries and benefits payable to the staff.
- c. Having regard to the status of the clerks and bailiffs as public servants, as found above, the Tribunal concludes that when the clerks and bailiffs hired the staff in the fee courts they did so as designates of the Minister, in furtherance of the Minister's obligation to "superintend all matters connected with the administration of the courts" under section 91 of the C. of J. Act.
- d. The Tribunal further concludes that the absence of a specific designation "in writing" from the Minister does not vitiate the designation which we find to exist in fact, particularly since at the time of the hiring of the employees in the fee courts, it was not known that the clerks and bailiffs were themselves public servants.

- e. Accordingly, the Tribunal concludes that the hiring of the staff of the fee courts by the clerks and bailiffs is an appointment by the Minister within the meaning of the P.S.A.
- f. Section 94 of the C. of J. Act provides that "such other employees as are considered necessary for the administration of the Courts in Ontario may be appointed under the P.S.A. Section 3 of the Min. of the A.-G. Act stipulates that "[s]uch officers, clerks and servants may be appointed under the P.S.A. as are required from time to time for the proper conduct of the business of the Ministry". We conclude that the staff of the Fee Courts hired by the clerks and bailiffs as designates of the Minister are "such other employees" or "such ... servants" and may be appointed under the P.S.A.
- g. For the reasons set out in respect of the court reporters, court interpreters and clerks and bailiffs, the Tribunal concludes for the staff of the fee courts as well that there is a presumption in the legislation, absent a compelling explanation to the contrary that they, as Crown employees appointed to the service of the Crown, as they are, will be appointed under the P.S.A.
- h. When the staff of the fee courts were hired, they were not expressly appointed under sections 6, 7 or 8 of the P.S.A. As set out in the Preamble to the Agreed Facts, at the time these people were initially employed, no consideration was given to following the procedures in the Ministry for appointment pursuant to section 8 of the P.S.A. because none was believed to be an employee.

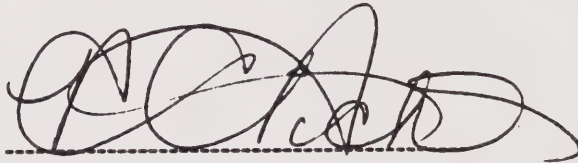
- i. The Tribunal is satisfied on the basis of the facts and submissions that had the Ministry realized when they were hired that the staff of the fee courts were its own employees and not the employees of the clerks and bailiffs, it would have knowingly appointed them to their positions in accordance with sections 6, 7 or 8 of the P.S.A. In all likelihood, in the ordinary course, any future such appointments would be under the P.S.A.
- j. Notwithstanding that the Ministry did not knowingly appoint the staff of the fee courts to the P.S.A., the Tribunal concludes on the basis of the reasoning set out in respect of the court reporters, court interpreters and clerks and bailiffs that they were in fact appointed under section 8 of the P.S.A.
- k. In the alternative, the Tribunal concludes, more generally, that notwithstanding that they were not appointed to either the classified or unclassified service, under section 6, 7 or 8 of the P.S.A. they were "person[s] appointed under [the P.S.A.] to the service of the Crown ... by a Minister ..." for the purposes of the definition of "public servant" under section 1(g) of the P.S.A.
- l. Accordingly, the Tribunal concludes that they are public servants under section 1(1)(m) of C.E.C.B.A. and thus fall within O.P.S.E.U.'s bargaining unit.



**XI. SUMMARY OF DECISION:**

On the basis of the foregoing the Tribunal finds that the freelance court reporters, the regular and casual court interpreters, the clerks and bailiffs, deputy clerks and bailiffs and staff of the small claims courts are public servants and fall within the Union's bargaining unit.

DATED at Toronto this 17th day of September, 1990.

A handwritten signature in dark ink, appearing to be 'P. C. Picher', written over a horizontal dashed line.

Pamela C. Picher - Chair

"William Walsh" - Member

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"John McGivney" - Member

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Crown Employees Collective Bargaining Act  
R.S.O. 1980, C. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/0018/89

BETWEEN:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

Complainant

- and -

THE CROWN IN RIGHT OF ONTARIO  
(MINISTRY OF CORRECTIONAL SERVICES)

Respondent

Before:

J.H. Devlin	Vice Chairperson
K. McDonald	Member
R. Redford	Member

For the Complainant:

Peter Lukasiewicz  
Counsel  
Gowling, Strathy & Henderson  
Barristers and Solicitors

For the Respondent:

Michael Fleishman  
Law Officer  
Crown Law Office - Civil  
Ministry of the Attorney General

Hearing:

February 13, 1990





The complaint which is dated June 15, 1989 was filed by the Union on behalf of Ken Cameron, a Correctional Officer 2 at the Elgin-Middlesex Detention Centre. The Union alleges that the Employer has discriminated against Mr. Cameron in relation to matters of attendance and vacation scheduling and has sought to penalize him because of his union activities. It is contended that the Employer's conduct is contrary to Section 29(2) of the Crown Employees Collective Bargaining Act.

At the outset of the hearing, Counsel for the Employer objected to the Tribunal entertaining the present complaint on the basis that an identical complaint was filed on April 9, 1989 and was subsequently withdrawn. Counsel for the Union did not dispute that the earlier complaint was identical in all material respects to the present complaint. He contended, however, that the earlier complaint was withdrawn on the understanding that certain conditions would be fulfilled; that those conditions were not fulfilled and, accordingly, the Union was entitled to refile the complaint.

The evidence introduced in relation to the Employer's preliminary objection indicates that a pre-hearing of the earlier complaint took place on April 25, 1989. At that meeting, the parties agreed to meet again on July 9, 1989 and with the assistance of Harry Waisglass, a Labour Relations Officer, to



endeavour to resolve both the complaint and a grievance which had been filed by Mr. Cameron which was pending before the Grievance Settlement Board. In the grievance, Mr. Cameron objected to the manner in which his 1989 vacation had been scheduled. It should be noted that vacation scheduling and, in particular, the allocation of vacation days is the subject of a local agreement between the Employer and the Union. The parties generally meet annually in the summer to review vacation allocations for the upcoming year.

On June 9, 1989, Mr. Waisglass met with representatives of both the Employer and the Union. Present on behalf of the Employer were Ian Starkie, the Superintendent of the Elgin-Middlesex Detention Centre and Jim Benedict, the Manager, Staff Relations and Compensation for the Ministry. Present on behalf of the Union were Ken Cameron and George Richards, a Senior Grievance Officer. The evidence indicates that in an effort to resolve the complaint and the grievance, Mr. Waisglass met with the parties both separately and together. At the final meeting at which both parties were present, Mr. Cameron and Mr. Richards signed a document entitled "Memorandum of Withdrawal" which provided that the complaint and the grievance were being withdrawn on a without prejudice basis.





It was the evidence of Mr. Starkie that during the final meeting with Mr. Waisglass, there was no discussion of any conditions being attached to the withdrawal of the complaint and the grievance and that the withdrawal was unqualified. Mr. Starkie acknowledged, however, that after the Memorandum of Withdrawal was signed, Mr. Waisglass suggested that he and Mr. Benedict meet with Mr. Cameron to discuss employment opportunities suited to Mr. Cameron's physical capabilities. Evidently, Mr. Cameron had previously sustained a work-related injury which had caused him to be absent from time to time and it was the Employer's response to his absenteeism which gave rise to one aspect of the complaint. In any event, Mr. Starkie also testified that at the conclusion of the meeting on June 9, 1989, Mr. Cameron was advised that his concerns with respect to vacation scheduling might be addressed at upcoming discussions between the Employer and the Union on the 1990 vacation schedule. Mr. Starkie testified, however, that he informed Mr. Cameron that he would have to abide by the position taken by the Union on this issue.

In contrast to the evidence of Mr. Starkie, Mr. Cameron testified that the Memorandum of Withdrawal did not represent the entire agreement between the parties. Instead, Mr. Cameron testified that the grievance and the complaint were withdrawn on the understanding that he and Mr. Starkie would endeavour to resolve the grievance locally and that Mr. Starkie would arrange



a meeting involving himself, Mr. Cameron and a counsellor from the Workers' Compensation Board. This latter meeting was evidently intended to explore job opportunities for Mr. Cameron, given his earlier injury.

Mr. Cameron testified that subsequent to the meeting on June 9, 1989, he consulted certain local Union representatives and advised them that his concerns had not been resolved with the result that the present complaint was filed on June 15, 1989. Once again, there was no dispute that this complaint is virtually identical to the earlier complaint.

Subsequently, in late July of 1989, a discussion took place between Mr. Starkie and Mr. Cameron with respect to Mr. Cameron's vacation schedule. Mr. Cameron testified that at that time, he advised Mr. Starkie that the issue raised in his grievance had not been resolved and accordingly, he wished to proceed with the grievance. As a result, Mr. Starkie provided him with the following letter:

"July 27, 1989

**PRIVATE & CONFIDENTIAL**

Mr. Ken Cameron  
C.O.2  
Elgin-Middlesex Detention Centre

Dear Mr. Cameron:

Further to our discussion on July 25, 1989, I have now had an opportunity to examine the grievance file pertaining to GSB 1278/88. There is no record of your having withdrawn





this grievance.

Our records do show that at the pre-hearing meeting on April 25, 1989 with Ms. M. Galway, you agreed to GSB 1278/88 being mediated together with your Labour Tribunal Complaint by Mr. H. Waisglass on June 9, 1989.

During the course of the mediation meeting your employer indicated that discussion of the 1990 vacation schedule was still ongoing and that the resolution of your grievance was possible during that process.

It is now evident that your grievance cannot be settled as originally contemplated and therefore we consider that GSB 1278/88 remains unresolved.

If you intend to proceed it is suggested that you notify the Registrar at the G.S.B. Your employer will not object, on the basis of time limits to the re-activation of GSB 1278/88.

"I. Starkie"  
I. Starkie,  
Superintendent

..."

Despite the wording of the letter of July 27, 1989, Mr. Starkie testified that the Employer did not indicate to Mr. Cameron at the meeting on June 9th that his grievance might be resolved during discussions between the parties with respect to the 1990 vacation schedule. Mr. Starkie suggested that, instead, the Employer indicated that his "concerns" might be resolved at that time. In any event, Mr. Starkie testified that because the Union was evidently not prepared to support Mr. Cameron's position on the issue of vacation scheduling and because Mr. Cameron had a different understanding concerning the outcome of the meeting of June 9, 1989, he agreed to permit Mr. Cameron to proceed with his grievance.



It was the submission of the Employer that the Memorandum of Withdrawal signed by Mr. Cameron and Mr. Richards was unconditional and that even if the Employer was subsequently prepared to permit Mr. Cameron to reactivate the grievance, this did not affect the withdrawal of the complaint. Accordingly, the Union could not refile the complaint and it was contended that the Tribunal is without jurisdiction to hear the matter. It was the submission of the Union that the withdrawal of the grievance and the complaint was subject to certain conditions and that when these conditions were not fulfilled, each of the parties returned to its original position. As a result, the Union was free to refile the complaint.

The issue then is whether the Tribunal has jurisdiction to entertain the complaint of June 15, 1989. In this regard, Section 32(5) of the Crown Employees Collective Bargaining Act provides that where a matter complained of has been settled and the settlement has been reduced to writing and signed by the parties or their representatives, the settlement is binding and must be complied with according to its terms. Equally, where the Union expressly or impliedly accepts the position of the Employer and withdraws a complaint unconditionally, it will not be permitted to have second thoughts at some later date and to refile the same complaint. Were it otherwise, there would be no finality to proceedings before the Tribunal and the Tribunal





could be subjected to an endless abuse of its process. See by way of analogy Re United Automobile Workers, Local 1285, and American Motors (Canada) Ltd. (1964), 14 L.A.C. 422.

In this case, the evidence indicates that on June 9, 1989, a Memorandum of Withdrawal was signed by Mr. Richards and Mr. Cameron which purported to withdraw both the initial complaint and the grievance. Although Mr. Starkie suggested that the withdrawal was unconditional, he acknowledged that a further meeting was to be held between himself and Mr. Cameron to address the attendance issue and that Mr. Cameron's vacation scheduling "concerns" were also to be raised at an upcoming meeting between the Employer and the Union. Even on Mr. Starkie's own evidence, therefore, it is apparent that further meetings were to take place in relation to the issues raised in the complaint and the grievance and that the Memorandum of Withdrawal did not represent the entire agreement or understanding between the parties. In other words, the withdrawal was not an unqualified acceptance of the position of the Employer but instead, the parties were going to attempt to resolve the matters raised in the grievance and the complaint by other means.

The conclusion we have reached is reinforced by the events of late July, 1989 at which time, Mr. Cameron approached Mr. Starkie and indicated that his vacation scheduling concerns had not been resolved. Given Mr. Starkie's oral evidence



regarding the intent of the Memorandum of Withdrawal, one would have expected him to advise Mr. Cameron that, in the Employer's view, that was the end of the matter. Instead, however, Mr. Starkie wrote a letter informing Mr. Cameron that as the grievance had not been settled during discussions relating to the 1990 vacation schedule, Mr. Cameron was free to pursue the grievance.

Given the Employer's position in relation to the grievance, a similar result must obtain with respect to the complaint. Firstly, like the vacation scheduling issue, there was also to be a meeting in relation to the attendance issue. No such meeting took place and, accordingly, that issue also remained unresolved. More importantly, however, this is not simply a case in which the grievance dealt with vacation scheduling and the complaint with attendance. In the complaint, the Union also objected to the manner in which the Employer dealt with Mr. Cameron in relation to vacation scheduling. The Employer agreed that Mr. Cameron could proceed with his grievance on this issue and there is no basis for concluding that the issue remained outstanding for purposes of the grievance and yet had been withdrawn for purposes of the complaint. In the result and given the position of the Employer with respect to the grievance, we find that the Tribunal has jurisdiction to entertain the merits of the complaint.





In concluding, however, we note that the Union acted prematurely in refiling the complaint on behalf of Mr. Cameron on June 15, 1989, only one week after the meeting with Mr. Waisglass. At that point, no reasonable opportunity had been provided within which to resolve the issues raised in the complaint and the grievance in the manner discussed at the meeting on June 9th. In our view, it was only in late July of 1989 when the Employer indicated that Mr. Cameron was free to proceed with his grievance that the Union ought to have refiled the complaint. Nevertheless, nothing would be gained, at this point, by requiring the Union to refile yet a third identical complaint. Accordingly, the hearing of the complaint shall proceed on the merits.

DATED AT TORONTO, this 16th day of May, 1990.

Tanz H. DeChia  
Vice Chairperson

"Kathy McDonald"  
Member

"Robert Redford"  
Member











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T/48/89

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

R.S.O. 1980, C. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

Between:

Ontario Public Service Employees Union

Applicant

- and -

The Crown in Right of Ontario  
(Ministry of Health) and Elinor Caplan  
Dr. Martin Barkin, Dean Wilkinson and  
Owen Sound Emergency Services Inc.

Respondents

BEFORE:

D.C. Stanley	Vice-Chairperson
K. McDonald	Member
W. Madigan	Member

FOR THE  
APPLICANT:

I. Roland  
M. Biggar  
Counsel  
Gowling, Strathy & Henderson  
Barristers & Solicitors

FOR THE  
RESPONDENTS:

D. Brown, Q.C.  
Director  
Crown Law Office - Civil  
Ministry of the Attorney General

M. Quick  
Counsel  
Ministry of Health

J. Middlebro'  
Counsel  
Middlebro', Stevens & Marsh  
Barristers & Solicitors

HEARING:

February 16, 1990



## INTERIM RULING ON RESPONDENTS REQUEST FOR A STAY OF PROCEEDINGS

The applicant in this case, the Ontario Public Service Employees Union, is seeking a declaration from this Board that the employer, who they allege to be the Crown in Right of Ontario ( Ministry of Health ), has caused a lock-out contrary to s. 27 of the *Crown Employees Collective Bargaining Act*. Also for consent to prosecute the employer for breach of the statute, and notice to employees that the union intends to proceed in the Supreme Court with an action to restrain the employer from continuing the breach.

When the matter came before us for hearing on February 16, the alleged employer, the Crown in Right of Ontario, applied for a stay of proceedings on the basis of an application for judicial review that had been commenced by the Crown in another matter. Counsel had two propositions ( actually three but only two are the subject of this ruling ); first, that a stay or adjournment ought to be granted until February 26, when the Divisional Court hears an Application for a stay in proceedings in that other matter; or second, that we ought to stay or adjourn this matter until the Court finally disposes of the application for judicial review in that other matter.





The Applicant is opposed to any delay in the hearing of this Application and submits that, as a matter of policy, because of the overriding public interest, it must be heard as expeditiously as possible.

Counsel for Owen Sound Ambulance Services Inc. , who the Crown alleges is the true employer, agreed with the submission of the Crown and supported their application for an adjournment or stay of proceedings.

That other matter, which is the object of the judicial review application is an Award of this Board, differently constituted, given on November 30, 1989. In that award Chairperson Pamela Picher found that an alleged private ambulance service, McKechnie Ambulance Service Inc., was in fact an agency of the Crown and that its employees were Crown employees under the meaning of our governing statute. Dennis W. Brown, Q.C., counsel making the request for a stay in this case, appeared for the Ministry in the McKechnie case.

The Ontario Public Service Employees Union was also the applicant in the McKechnie case. They allege here that Owen Sound Ambulance Services Inc. is in the same position as McKechnie. Consequently, employees of that service, who were subject to an expired collective agreement negotiated on their behalf by OPSEU, and who were on strike in November when the McKechnie decision was handed down, are, like the employees of McKechnie ambulance Services, Crown Employees. If they are Crown employees they are prohibited from striking and are compelled to submit their bargaining impasse to binding arbitration. Likewise the



employer can not lock them out.

The employer does not concede that these employees are in the same position as the employees of McKechnie Ambulance Service. Thus the preliminary issue, of whether these are Crown employees, will have to be addressed by us before deciding the merits of this application, if we do not grant a stay.

It is also important to know that the position of the employer is that these employees are free to return to work: that they are on strike and not locked out. This is the core legal determination that will have to be made on addressing the merits of the application.

Counsel for the Crown submits that this matter ought to be stayed because the applicant is asking that the McKechnie Award be applied to these employees, and because the McKechnie Award is wrong, an issue which the Court has been asked to decide on judicial review. However counsel was not prepared to accept the courts decision on the McKechnie judicial review would finally determine the status of these employees.

The principle thrust of the Union's argument is that, since the employer is not prepared to accept that the McKechnie decision is determinative of the issue of the status of these employees, the employer's request for a stay amounts to an unwarranted delay in the recognition of the rights of these employees. They rely on the often cited reference by Mr. Justice Estey in *The Journal Publishing Company of Ottawa Ltd. and Ottawa Newspaper Guild*, (March 31, 1977, unreported),





to the fact that, in industrial relations matters, rights delayed are rights denied.

Counsel for the Crown accepted that for us to exercise our discretion to grant a stay there must be some irreparable harm to their interests resulting from our proceeding to hear the case, they must have a strong *prima facie* case for relief, and on a balance of interests the matter should be stayed. A fourth factor, the public interest, was also argued to favour the Crown's case for an adjournment. Authorities were referred to us which we have carefully considered.

In support of the contention that there was a potential for irreparable harm if the matter were to proceed, the Crown presented evidence through Ronald Lenevue, Assistant Deputy Minister, Corporate Administration, Ministry of Health. That evidence was, on the whole, vague and conjectural with respect to any real cost associated with the eventuality that we might find the employees covered by this application to be employees of the Crown. The general thrust of the evidence was directed to the cost and inconvenience to the Ministry of Health, arising as a consequences of the McKechnie Award.

The only reason for an Administrative Tribunal to consider staying an application determinative of important legal issues, because of some matter having been brought in another forum, is that the very issue to be decided by the Tribunal will be settled in that other forum; and the decision in that other forum is binding on the Tribunal. Then the Tribunal goes on to apply the tests of irreparable harm, *prima facie* case for



relief, and balance of interest. Counsel for the Crown can not ask us to defer to the Court on the McKechnie case, and at the same time refuse to accept that the Courts decision in McKechnie is determinative of the issue of employee status in this case.

Although we would refuse to stay these proceedings, pending the outcome of the Crown's application for judicial review in McKechnie, solely on the basis of the Crown not accepting that the Courts decision would be determinative of the issue of employee status in this case, we would also comment on the other factors submitted to us for consideration.

If we proceed to hear the merits of this case we might conclude that these employees, like those of McKechnie Ambulance Service, are Crown employees for the purposes of collective bargaining. The crown would be obligated to negotiate a collective agreement with them and, failing that, to submit unresolved issues to binding arbitration. We do not accept that any irreparable harm to the Crown can arise out of that eventuality. The Crowns argument on irreparable harm has to do with the relationship between the Crown and people who, if McKechnie applies, are their agents and is not restricted to consequences that necessarily flow simply from this case. The Crown's argument, on this preliminary motion, comes close to asking us to reconsider the wisdom of the McKechnie decision.

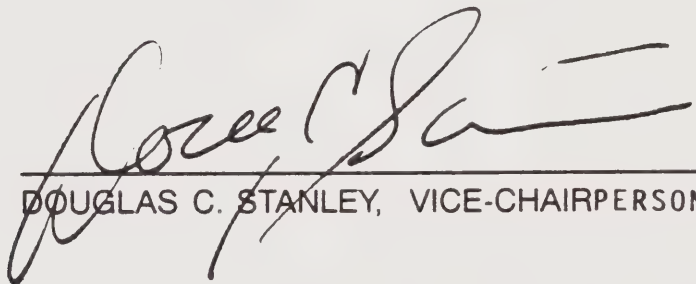
From the point of view of a balance of interests, if we were to stay this application, the employees affected face the prospect of continuing





for an extended period of time in a kind of limbo. They allege they are locked out and the employer maintains they are on strike. The issue will not be settled until the preliminary issue of who the employer is gets determined. To leave these employees in this state of uncertainty is, on balance, an unnecessary imposition. From the point of view of the balance of interest between these parties, and from the point of view of the public interest, their status ought to be determined as soon as possible so that their collective bargaining dispute can be resolved.

DATED THIS 19 DAY OF FEBRUARY 1990



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DOUGLAS C. STANLEY, VICE-CHAIRPERSON



---

K. MCDONALD, MEMBER



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W. MADIGAN, MEMBER











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THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

R.S.O. 1980, C. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

Between:

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- and -

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Barristers & Solicitors

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RESPONDENTS:

D. Brown, Q.C.  
Director  
Crown Law Office - Civil  
Ministry of the Attorney General

J. Middlebro'  
Counsel  
Middlebro', Stevens & Marsh  
Barristers & Solicitors

HEARING:

March 2, 1990



## D E C I S I O N

The Applicant in this case, Ontario Public Service Employees Union (OPSEU), seeks a declaration that the "respondent employer and its representatives" have caused a lock out contrary to s. 27 of the Crown Employees Collective Bargaining Act. They also ask for consent to prosecute the employer for the alleged violation of the Act pursuant to s. 44, and that this tribunal provide notice to the employees of an application to be commenced in the Supreme Court of Ontario to restrain the employer from continuing the breach.

All of this depends on a preliminary finding that the employees are Crown Employees as defined by the Public Service Act. Further, that such a declaration of status has retroactive effect.

The Union's case respecting status is that an earlier decision of this Board, *OPSEU and CROWN and McKechnie Ambulance Services*, November 30, 1989 (unreported), attached hereto as Appendix "A", is binding on us. The Union is asking that we find McKechnie to be more than simply a binding precedent, they are in effect asking us to conclude that the





Board's decision concerning the status of employees in that case also fixed the status of employees subject to this application.

Sometime in November, prior to the McKechnie decision, the employees of Owen Sound Ambulance Services went on a legal strike; exercising their right to do so under the *Labour Relations Act*, the statute under which OPSEU was certified to represent them, and under which they had bargained for several contracts. The effect of the McKechnie decision was to say that the ambulance service was an agent of the crown, and employees of that ambulance service were employees of the Crown. As such they would henceforth be subject to the *Crown Employees Collective Bargaining Act*, not the *Labour Relations Act*. That meant they could no longer strike but must submit bargaining disputes to binding arbitration.

OPSEU takes the position that this decision was a declaration of a status that existed, that it did not create a new status for these employees. Moreover, that the employees of Owen Sound Ambulance Service were employed in substantially the same circumstances, consequently the McKechnie decision should have been taken as a recognition of their status as well. The effect of all this, according to the Applicant, was to immediately render what was a strike under the *Labour Relations Act* an illegal lock-out under the *Crown Employees Collective Bargaining Act*. Their position is not simply that McKechnie has precedent value, but that it also had a substantive affect on the status of these employees.

The Crown is seeking a judicial review of the McKechnie decision. In



an earlier ruling this panel rejected the Crown's application for a stay of proceedings pending either the outcome of that application for review or a stay application brought in connection with it.

There was an agreed Statement of Fact, which is appended hereto as Appendix "B". A reading of that Statement of Fact, with the facts as set out in the McKechnie Award, illustrate that the relationship between the Crown and Owen Sound Ambulance Service and the Crown and McKechnie Ambulance Service is in all material respects identical.

Counsel for Owen Sound Ambulance Service submitted that nothing in the McKechnie Award was directed to, or could be binding on his client in their relationship with the Crown and with their employees. Further, he presented arguments, based on the *Crown Agency Act R.S.O. 1980 c. 106*, to dispute the notion that, on the facts as presented in this case, his client could be found to be acting as an agent of the Crown. He contended that the three qualifications of ownership, control, and operation, referred to in s.1 of that Statute, were simply not met in this case. In summary, his position is that Owen Sound Ambulance Service is an independent Company operating under the *Business Corporations Act*, admittedly in a regulated sector, but that the regulation by the Ministry of Health does not establish these ambulance services as agencies of the crown.

Counsel for the Ministry of Health took a similar position with respect to the effect of the McKechnie Award, arguing that it could have no impact on the status of the employees of Owen Sound Ambulance





Service, or any of the other independent services of this nature. He also submitted that this Board is not bound by any higher test than "clear error" in deciding whether to follow McKechnie as precedent. His argument then went on to demonstrate what he considered to be the error in the earlier Award.

Counsel for the Applicant urges that we follow the standard set by Chairman Shime in *Blake et al and Amalgamated Transit Union, January 22, 1988 (unreported)*, set out at page 8, as follows:

..... arbitrators have balanced the interests of individual decision making with predictability by generally adopting a policy that they will not depart from earlier decisions unless such decisions are manifestly in error.

But the Grievance Settlement Board is one entity - it is not a series of separately constituted boards of arbitration. Under Section 20(1) of the Crown Employees Collective Bargaining Act there is "a Grievance Settlement Board" - that is, one Board. Under Section 20(4) the Grievance Settlement Board may sit in two panels and under Section 20(6) a decision of the majority of a panel is "the decision" of the Grievance Settlement Board.

Thus each decision by a panel becomes a decision of the Board and in our opinion the standard of manifest error which is appropriate for the private sector is not appropriate for the Grievance Settlement Board. The Act does not give one panel the right to overrule another panel or to sit on appeal on the decisions of an earlier panel. Also, given the volume of cases that are currently administered by this Board, the continuous attempts to persuade one panel that another panel was in error only



encourages a multiplicity of proceedings and arbitrator shopping which in turn creates undue administrative difficulties in handling the case load.

We were urged to accept and apply the Boards earlier decision as determining the substantive issues in this case. We would agree with and adopt the comments made by Shime as to the position of this Board in relation to the decisions of the Board differently constituted.

We have given the evidence in this case careful scrutiny. We have considered the arguments made to us on the substantive issues and have considered the precedent value of the McKechnie decision. We have carefully read the McKechnie decision and find that the arguments made before us were made and considered by the Board in that case. That case is, in our opinion, on all fours with the case before us and we consider it to be binding precedent.

Based on the precedent of the McKechnie decision, and its application to the facts of this case, we must conclude that Owen Sound Ambulance Service is a Crown Agent and that the employees are Crown employees subject to the *Crown Employees Collective Bargaining Act*.

However, we reject the notion that the McKechnie case is something more than precedent for us to consider in this case. This case is decided on it's own evidence and the application of the law, as elucidated by this Board in McKechnie, to those facts. Although it might have been open to





the Crown to agree that it did, the McKechnie decision did not have the effect of making the employees of Owen Sound Ambulance Service Crown Employees, and even then there is still a third party affected who could properly object. The status of these employees is not fixed until this Board makes a finding as to the application of the principles set out in the earlier case to the case at hand. As a consequence we can not find that the employees were either locked out or on strike, contrary to the Statute, at any time prior to a determination of their status being made.

Having made such a determination of status, in disposing of the Application before us, we would make the following declaration.

1. As of the date of this award any continuation of a strike or a lock out is contrary to the provisions of the *Crown Employees Collective Bargaining Act*.

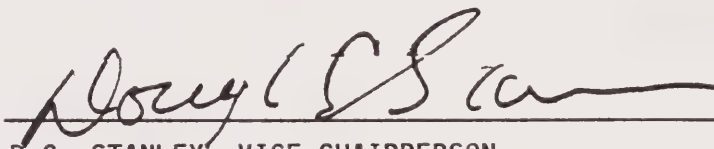
2. The expired Collective agreement, entered into by Owen Sound Ambulance Service and OPSEU must be considered to have been entered into by an agent of the Crown and must be taken as having been a collective agreement under the *Crown Employees Collective Bargaining Act*.

3. The *Crown Employees Collective Bargaining Act* governs the relationship between the employees and the Crown.



4. The Applicants request for consent to prosecute under s. 27 is denied, as is their request that we provide notice to employees of impending action.

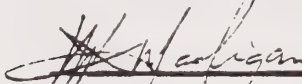
DATED at Toronto, this 19th day of MARCH, 1990.



D.C. STANLEY, VICE-CHAIRPERSON



K. McDONALD, MEMBER



W. MADIGAN, MEMBER





CROWN EMPLOYEES' COLLECTIVE BARGAINING ACT

BEFORE THE ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

B E T W E E N:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

Applicant

and

THE CROWN IN RIGHT OF ONTARIO (MINISTRY OF HEALTH),  
ELINOR CAPLAN, DR. MARTIN BARKIN,  
DEAN WILKINSON and  
OWEN SOUND EMERGENCY SERVICES INC.

Respondents

AGREED STATEMENT OF FACTS

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Barristers & Solicitors  
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Ian J. Roland  
(416) 862-8484

Solicitors for the Applicant



CROWN EMPLOYEES' COLLECTIVE BARGAINING ACT

BEFORE THE ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

B E T W E E N:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

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DEAN WILKINSON and  
OWEN SOUND EMERGENCY SERVICES INC.

Respondents

AGREED STATEMENT OF FACTS

1. OPSEU is the collective bargaining agent for 24 full-time and 10 part-time ambulance attendants employed by Owen Sound Emergency Services Inc. OPSEU was certified as the collective bargaining agent by the Ontario Labour Relations Board on October 4, 1979 for the full-time unit, and on April 6, 1987 for the part-time unit.
2. Owen Sound Emergency Services Inc. is a privately held corporation incorporated under the laws of the Province of Ontario on or about July 30, 1979. Owen Sound Emergency Services Inc. operates an ambulance service known as "Owen Sound Ambulance" in or about the communities of Owen Sound, Port Elgin and Kincardine, in the Province of Ontario.





It has done so since in or about 1979 in Owen Sound, and since 1982 in Port Elgin and Kincardine. The principals of Owen Sound Emergency Services Inc. are Dean Wilkinson, President and Thomas Churchill, Secretary. Messrs. Wilkinson and Churchill own Owen Sound Emergency Inc. and supervise the work of and are employed as ambulance attendants with Owen Sound Emergency Services Inc. (hereinafter "Owen Sound Ambulance").

3. There are presently five types of ambulances services operated in the Province of Ontario. Ambulance services may be provided:

- (a) by the Ministry of Health,
- (b) by a hospital,
- (c) by a municipality,
- (d) by a volunteer organization or
- (e) by an individual or corporation such as the respondent,  
Owen Sound Emergency Services Inc.

The Ministry of Health (hereinafter referred to as "the Ministry") licenses all of the operators of ambulance services apart from the services provided by it. This application is only concerned with the licensed operator referred to in clause (e) above, Owen Sound Ambulance, whose license is subject only to those terms and conditions set out



in the Ambulance Act and Regulations.

4. In or about the year 1960, the Ontario Ambulance Operators' Association Inc. (hereinafter referred to as "Association") was formed. The Association was formally incorporated in or about the year 1963.

Prior to 1968, there were approximately 400 private ambulance operators doing business in Ontario. There were no common standards with respect to service levels, personnel training, equipment requirements, patient care, or other facets of ambulance service operations. As a result, in some areas of the province, normally in the larger metropolitan areas, service was rendered at an acceptable level. In some of the more remote areas of the province, the services provided were unsatisfactory, marked by the use of untrained ambulance attendants along with outdated vehicles and equipment. In most cases, payment was on a patient pay-by-call basis which made it difficult for the operators to collect their fees.

5. It was the intent of the Association to secure the creation of a central regulatory agency which would implement standards for all ambulance service operators in the province. In this regard, the Association recognized the need for a comprehensive scheme of licensing to ensure uniform and satisfactory service throughout the province.





6. Between 1968 and 1973, licensed ambulance services were not sold between licensed operators. During this time, an operator who wished to sell his services would contract with the Ontario Hospital Service Commission. Some of these services were later sold to licensed operators and others were later assumed by the Commission's statutory successor, the Ministry of Health.

Since 1973, licensed ambulance services have been bought and sold as business undertakings in the private sector. The purchaser is required to obtain a license from the Ministry to operate the service. Presently, there are 176 licensed operators in Ontario of which seventy licensed operators in the province, including Owen Sound Emergency Services Inc., operate as category 3(e), see page 2.3(e) ambulance services.

7. Under the Health Insurance Act, all ambulance services rendered to insured persons are "insured services" and, accordingly, insured persons are entitled to have such services paid for the Ministry on their behalf, (which may be subject to a co-payment by the insured person). Under section 34 of the Health Insurance Act, R.S.O. 1980, c.197 and clause 6(1)(e) of the Ministry of Health Act, R.S.O. 1980, c.280 the amount payable by the Ministry to Owen Sound Ambulance in respect of the insured services provided by Owen Sound Ambulance are paid in the form of payment of "all or any part of annual expenditures" of Owen Sound Ambulance.



The payment for services provided is set out in clause 4(1)(f) of the Ambulance Act, R.S.O. 1980, c.20 and is more particularly described in paragraphs 10, 19, 20, 36, 37 and 38 below.

8. In order to obtain its annual funding from the Ministry, each year Owen Sound Ambulance submits an estimate of its projected expenditures in the following year for the provision of ambulance services. The estimate is reviewed by the Ministry, and the Ministry determines the amount to be paid to Owen Sound Ambulance during the following year. The total amount is provided to the operators in instalments over the year and is subject to adjustment after the end of the year based on Owen Sound Ambulance's cost of provided ambulance services in that year, as shown in paragraphs 19, 20 and 21 below. Attached as Appendix "A" are the Ministry of Health forms used by ambulance services, including Owen Sound Ambulance, in fiscal year 1986/87 for budget requests and approval by the Ministry.
9. Owen Sound Ambulance is liable for its own operating expenses. If it incurs expenses which exceeds the amount paid by the Ministry, it must pay those expenses out of any money which it receives from other sources funded by the Ministry. If no funded monies are available, the Owen Sound Ambulance must provide same itself.





10. For Owen Sound Ambulance, the annual amount provided by the Ministry includes an amount to pay the cost of management of the service. The operator is free to engage management services from any sources; in the case of Owen Sound Ambulance, management is provided by Dean Wilkinson and Thomas Churchill. The amount to pay the cost of management (known as "the Management Compensation Plan") varies annually for Owen Sound Ambulance according to its "call volume" - that is, the number of calls for ambulance services responded to by Owen Sound Ambulance and also varies annually with the number of satellite stations.
11. The previous and only collective agreement between Owen Sound Ambulance and OPSEU for the part-time unit ran from April 1, 1988 to the date it expired on March 31, 1989. The previous collective agreement between Owen Sound Ambulance and OPSEU for the full-time unit also expired on March 31, 1989.
12. The first collective agreement between OPSEU and Owen Sound Ambulance provided that the agreement was conditional on approval by the Ministry of Health. Such a clause has not appeared in any subsequent agreement.
13. Such conditional clauses are common in collective agreements between licensed ambulance operators and certified bargaining agents.



14. Former directors of the Ambulance Services Branch of the Ministry and OPSEU have expressed their disapproval to licensed operators with respect to such conditional clauses. Nevertheless, in order to protect themselves against potential expenditures exceeding the amount payable by the Ministry, the operators have continued to include such clauses in their negotiated collective agreements.
15. Attached hereto as Appendix "B" is a letter from Gordon Ventura, a former director of the Ministry of Health's Ambulance Services Branch, to Owen Sound Emergency Services Inc. indicating the Ministry's position with respect to such conditional clauses.
16. Owen Sound Ambulance retains its own counsel and negotiates directly with OPSEU in order to agree upon all of the terms of a collective agreement.
17. The Ministry does not participate in the negotiations. However, it does provide information on the request of a licensed operator such as Owen Sound Ambulance with respect to general funding limits.
18. Owen Sound Ambulance hires, fires and disciplines its staff. In the event that Owen Sound Ambulance wishes to hire staff in addition to the staff funded by the Ministry, Owen Sound Ambulance is free to do so provided that the cost of the





additional staff is underwritten by Owen Sound Ambulance.

19. Attached hereto as Appendix "C" is a letter dated May 5, 1989, from Dean Wilkinson of Owen Sound Ambulance to Mr. Bryan Clarke, Assistant Regional Manager, Emergency Health Services, Ministry of Health, setting out the Owen Sound Ambulance budget request for 1989/90. The attached "Ambulance Allocation Detail Report" sets out the line by line budgeted items for 1988/89 as well as the Ministry's 1989/90 allocation. The handwritten figures under the column "Service Request (if diff.)" are the increased budgeted items requested by Dean Wilkinson as part of the 1989/90 budget request on behalf of Owen Sound Ambulance.
20. Attached hereto as Appendix "D" is a letter from the Ministry of Health (H. Bryan Clarke) to Owen Sound Ambulance dated August 16, 1989, setting out the approved 1989/90 budget for Owen Sound Ambulance. The attached "1989/90 Ambulance Budget Detailed Report" sets out a summary of the 1989/90 budget costs and shows a net operation cost of \$1,583,815.00 provided by the Ministry of Health, after deducting "other revenue" from the gross operating cost, in order to arrive at the net operating cost.
21. In the 1989/90 Collective Agreement negotiations with OPSEU the offer from Owen Sound Ambulance for salary and benefits was less than the amount approved in the budget allocation



provided for 1989/90. Graham Brands, Director, Ambulance Services Branch, Ministry of Health, explained to the union representative that the 1989/90 budget for Owen Sound Ambulance also included a cost overrun experienced by Owen Sound Ambulance in the previous year, brought about by the negotiated part-time ambulance attendants agreement arrived at after the 1988/89 budget allocation

22. Owen Sound Ambulance operates eleven ambulance service vehicles in Owen Sound, Port Elgin and Kincardine. Owen Sound Ambulance has three ambulance stations, one in each of the three communities it serves, Owen Sound, Port Elgin and Kincardine. There are a total of eight ambulance vehicles stationed in Owen Sound, made up of one duty officer vehicle, one support unit, four ambulances in regular service and one ambulance as a service spare and one area ambulance vehicle stationed in Owen Sound to be used, as required by the Ministry of Health in Grey - Bruce District of the Ministry of Health. There are two ambulances operated out of the Port Elgin Station and a single ambulance operated out of the Kincardine station. All of the ambulance service vehicles but for the duty officer vehicle a station wagon leased by Owen Sound Ambulance and virtually all of the equipment in the eleven vehicles, including radio equipment, are owned by Her Majesty the Queen in right of Ontario.

23. The ambulance service vehicles operated by Owen Sound





Ambulance are painted with the markings as required by Schedule 1 of Regulation 14 under the Ambulance Act, R.S.O. 1980, c.20 and, in addition, have the Province of Ontario crest and the words, "Ministry of Health" on each door but for the leased vehicle. Owen Sound Ambulance has exercised its discretion to put its own markings on the ambulances, in the form of a crest. This sort of marking is common in the industry and is seen in the photographs attached hereto as Appendix "E". The leased vehicle only has words "Owen Sound Ambulance" and "Duty Officer" on it.

24. Attached hereto as Appendix "F" to this Statement of Facts is a manual known as the "OASIS" manual. "OASIS" stands for Ontario Ambulance Service Information System. It sets out the province-wide requirements for the documentation by ambulance driver/attendants of the movement of ambulances in Ontario. This system allows the Ministry of Health to monitor patient movement by ambulances. Copies of the "OASIS" manual are found at each of the three ambulance stations and are available for the use of the ambulance attendants. The forms themselves have been updated for use across Ontario, the forms being part of the Regulations under the Ambulance Act.

25. The Ministry of Health requires any movement of an ambulance vehicle on any kind of call to be recorded on the OASIS system which is a system of record keeping that is detailed



and requires both the ambulance attendant and the operator to assure that the records are submitted in the appropriate way as required by the OASIS manual.

26. Included in the OASIS manual is the AS5-A/B form. Responsibility for completing the form is usually shared by the ambulance attendants responding to the call, who complete the "A" portion and the hospital staff, who complete the "B" portion. In the event that a hospital is not contacted during an ambulance trip, the ambulance attendants complete both portions of the form.
27. The system of ambulance dispatch in and about Owen Sound is run by the Ministry of Health through a centralized dispatch system located in Owen sound and known as the Grey - Bruce Central Ambulance Communications Centre.
28. Owen Sound Ambulance is part of the Grey - Bruce Area and the central Ministry-run system operates out of Owen sound, Ontario and directs the movement of ambulances both at Owen sound and at other ambulance services in the Grey - Bruce Area.
29. The personnel employed in the central area dispatch service are Ministry of Health public servants.
30. Ambulances may only be moved if authority to do so is





obtained from the dispatchers.

31. All calls for ambulances from the consuming public come through the dispatch system. In a low percentage of instances an emergency call, normally a local call, might happen to come directly into one of the Owen Sound Ambulance's business lines. In such a case a vehicle would be dispatched and Central Ambulance Communication Centre would be notified; the movement of the vehicle would then be monitored directly by Central Ambulance Communication Centre. the operator must not use or permit to be used any telephone line under his control for the purpose of receiving calls for ambulance service and must not advertise or hold out any telephone number to call for ambulance service except the number of the Ministry's Communications Centre (s.4(d) of Regulations 14 of the Ambulance Act).
32. The dispatch service itself may bring ambulances from other services into Owen Sound to assist, or it may take ambulances from Owen Sound Ambulance to other areas to assist other services in providing ambulance services, including services operated by the Ministry of Health itself. Prior to 1983 the dispatch function was performed by owner operators and a similar arrangement existed to assist each of the other services with Ambulance as needed.
33. Attached hereto as Appendix "G" to this Statement of Facts is



a document entitled "CACC Grey Bruce Regional Dispatch". This manual is prepared by the Ministry for use by its dispatchers at its Central Ambulance Communications Centre known as "CACC Grey Bruce". This centre is the dispatch or communications centre for all ambulance services, including Owen Sound, in the Grey-Bruce Area. Individual services policies are agreed upon by the local operators and the Ministry Communications Centre at an operators meeting between Ministry and local operators about every two months. These include stand-by locations, meal periods, utilization of staff vehicles, and general policies concerning local administrative notification by the Ministry Communications Centre.

34. The CACC Grey - Bruce Regional Dispatch Manual includes instructions and specific direction to ambulance personnel employed by the Ministry with respect to the various procedures set out therein. The manual is also available to the ambulance attendants of Owen Sound Ambulance to serve as a guideline in carrying out their functions. Owen Sound Ambulance had its own policy and procedures manual which it has had since it commenced operation in 1979.
35. The CACC Grey - Bruce Manual has a section headed "Owen Sound" and refers to Owen Sound Ambulance which operates out of Owen Sound, Port Elgin and Kincardine. It contains a provision that sets scheduling, crew and vehicle requirements



for Owen Sound Ambulance.

36. On the 10th day of January, 1985, Mr. Malcom Bates of the Ambulance Services Branch of the Ministry of Health, forwarded to all the private ambulance operators a series of financial policies and procedures together with a standard for ambulance services management. This documentation referred to as "Quality of Ambulance Service Management/Financial Policies and Procedures" (Q.A.S.M.F.P.P.) was a consolidation of information which has been forwarded from time to time to the private ambulance operators over the past few years. The document forwarded by Mr. Malcom Bates is attached hereto as Appendix "H".

The covering letter to this consolidation of policies and procedures dated January 10, 1985 provides as follows:

Ontario Ministry of Health  
January 10, 1985

MEMORANDUM

TO: All Ambulance Services  
(excluding A.S.B. Services)

FROM: Malcom Bates  
Manager  
Land Ambulance

RE: The Quality of Ambulance Service  
Management/Financial Policies and  
Procedures

---

It is the intention of Emergency Health Services to assist all operators and their accountants/auditors in fully





comprehending the methods and procedures which will result in the provision of good ambulance service management.

Enclosed herewith, therefore, you will find a manual inclusive of:

- 1) a section addressed to service operators describing the expectations of Emergency Health Services with respect to the management quality of an ambulance service;
- 2) a section of Financial Policies and Procedures which, in complementing the Ambulance Act and Regulation 14, provides a concise financial reference for ambulance service operators functioning through transfer payments.

I would urge you to carefully read both of these sections, paying particular attention to any discrepancies you may detect that exist between the procedures/policies that your service now follows and those contained in the enclosed items; any such differences should be referred to your Regional Manager of Assistant Regional Manager immediately. Further, please also bring to the attention of your Regional/Assistant Regional Manager any matters which you believe should be clarified in the Financial Manual.

Your comments to your Regional Management are welcomed.

"Malcom Bates"

37. Owen Sound ambulance, like other ambulance services, is obliged to submit "Quarterly Financial Statements" to the Ministry of Health. Attached as Appendix "I" is a copy of the Quarterly Financial Statement form to be submitted to the Ministry.

38. The two principals of Owen Sound Emergency Services Inc.,



Dean Wilkinson and Tom Churchill, are known as the "operators" of Owen Sound Ambulance. As part of the annual operating budget of Owen Sound Ambulance, they are budgeted to work as ambulance attendants at salary equal to that of the ambulance attendants employed with Owen Sound Ambulance. In addition, Owen Sound Emergency Services Inc. receive payment under a Management Compensation Plan, as already referred to, in accordance with the call volume of the ambulance service.

.

39. Two of the three ambulance stations (Owen Sound and Port Elgin) are owned by an Ontario numbered company, 418435 Ontario Limited, which was incorporated in or about June 27, 1979. The president is Dean D. Wilkinson and the secretary is Thomas W. Churchill. The two stations located at Owen Sound and Port Elgin are leased from 418435 Ontario Limited, which leases are entirely paid by the Ministry of Health. The third ambulance station at Kincardine is leased by Owen Sound Ambulance, which lease is also paid for by the Ministry of Health.
40. A strike began at Owen Sound Ambulance on or about November 15, 1989. The decision in OSPEU and Crown in Right of Ontario (Ministry of Health) and McKechnie Ambulance Services Inc. (T/58/84) was released on or about November 30, 1989. Letters dated December 7, 1989 and January 5 and 12, 1990 were directed by OPSEU to the Ministry of Health and the





letters of January 5 and 12, 1990 were also copied to Owen Sound Ambulance. Attached as Appendix "J" is this correspondence from OPSEU. Owen Sound Ambulance first received copies of this correspondence on January 3, 1990 when first provided by OPSEU.









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T/0055/89

**THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT**  
**R.S.O. 1980, C. 108**

**ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL**

**Between:**

OPSEU (Derek Miller)

**Complainant**

- and -

The Crown in Right of Ontario  
(Ministry of Correctional Services)

**Respondent**

**BEFORE:**

J.D. Devlin	Vice-Chairperson
M.J. Sullivan	Member
W.J. Madigan	Member

**FOR THE  
COMPLAINANT:**

C. Paliare  
Counsel  
Gowling, Strathy & Henderson  
Barristers & Solicitors

**FOR THE  
RESPONDENT:**

M. Fleishman  
Law Officer  
Crown Law Office - Civil  
Ministry of the Attorney General

**HEARING:**

April 5, 1990





The complaint in this matter was filed on behalf of the Union by Derek Miller, a Correctional Officer at the Toronto East Detention Centre and the Chief Steward of the Local 582. In the complaint, it is alleged that by denying Correctional Officers access to huts in the course of conducting perimeter patrols, the Employer violated Sections 29(2)(a) and (c) and Section 29(3) of the Crown Employees Collective Bargaining Act. These sections are as follows:

29.-(2) The employer or any person acting on behalf of the employer shall not,

- (a) refuse to employ or to continue to employ or discriminate against a person with regard to employment or any term or condition of employment because the person is exercising any right under this Act or is or is not a member of an employee organization;

...

- (c) seek by intimidation, by threat of dismissal or by any other kind of threat or by the imposition of a pecuniary or any other penalty or by any other means to compel an employee to become or refrain from becoming or to continue or cease to be a member of an employee organization, or to refrain from exercising any other right under this Act; or

...

(3) No person or employee organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of an employee organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.



At the Toronto East Detention Centre, there are two exercise yards which are separated by a gymnasium. Beyond the wall of the yards is a fence which marks the boundary of the Detention Centre. Between the wall and the fence and running parallel with the exercise yards is an area which is approximately 25 to 30 feet wide. Inside this area, there are two huts. These huts were initially constructed of wood but in 1987, were replaced with metal huts equipped with heating ducts. On the outer wall of the exercise yards, there is also a camera which scans a portion of the perimeter.

From at least 1982 until November of 1988, two Correctional Officers conducted perimeter patrols in the area between the wall and the fence when inmates were exercising in the yards. The purpose of these patrols was to ensure that no contraband was thrown over the fence into the yards and to prevent inmates from escaping or being assisted in doing so by individuals outside the Detention Centre.

Prior to November of 1988, perimeter patrols were generally conducted twice daily with the first patrol taking place from 9:00 a.m. to 10:30 a.m. and the second, from 1:30 p.m. to 3:00 p.m. However, in inclement weather, exercise periods were sometimes shortened or cancelled altogether so that the length of the patrols was correspondingly reduced. Prior to going out on patrol, Correctional Officers obtained keys to the





huts which were located in the area to be patrolled. The evidence indicates that, in the normal course, Officers alternated between spending time in the huts and actually patrolling the perimeter. From windows inside the huts, the Officers had a clear view of both the area between the wall and the fence and the road beyond the fence.

On November 17, 1988, George Simpson, the Superintendent of the Toronto East Detention Centre issued a memorandum outlining a number of "staffing actions" which were to be implemented with a view to reducing expenditures. One of these involved the elimination of perimeter patrols and, in this respect, the relevant portions of the memorandum are as follows:

#### **STAFFING ACTIONS**

Due to the fact that this institution is projected to have a budget shortfall in the amount of \$1 million plus, it is essential that we take steps to reduce our expenditures. Therefore, in conjunction with the Staff Scheduling Officer, I wish the following staffing actions to be initiated as soon as possible but consistent with the requirements of the Collective agreement.

...

2. The outside patrol officer is to be abolished on all shifts.

...

As a result of Mr. Simpson's memorandum, a grievance was filed by Steven Scott, a Correctional Officer, in which it was alleged that the elimination of perimeter patrols was in violation of the Collective Agreement and, in particular, of the



health and safety provisions of the Agreement found in Article 18. Mr. Scott's grievance came before the Grievance Settlement Board in October of 1989 and at that time, the parties agreed to adjourn the hearing on certain conditions which were incorporated into an order of the Board as follows:

- 1) The parties agree that the situation with respect to the loss of the Perimeter Patrol is not satisfactory from the perspective of the Union;
- 2) The parties agree to schedule a series of meetings as soon as possible to work out a mutually acceptable solution to the Union's perception of the problem;
- 3) The aforesaid meetings will convene not later than 90 days from the date of issue of this Order.

In accordance with these conditions, a meeting was scheduled between representatives of the Employer and the Union in mid November of 1989. Present at the meeting on behalf of the Employer were George Simpson, Paul Mulhern, the Deputy Superintendent of the Detention Centre, and Alex Mitchell, the Acting Assistant Superintendent. Present on behalf of the Union were Sharon Johnston, the President of the Local, Derek Miller and Steven Scott. As a result of the meeting, an agreement was reached whereby only one exercise yard would be used at any given time and when that yard was in use, one Correctional Officer would be assigned to patrol the perimeter. This agreement evidently satisfied the Union's concerns about the elimination of perimeter patrols while, at the same time, addressing the Employer's economic concerns as one rather than two Correctional



Officers would be assigned to such patrols in the future. In the result, the parties executed a Memorandum of Settlement outlining their agreement, the material portions of which are as follows:

RE: GRIEVANCE: REMOVAL OF OUTSIDE PATROL OFFICER

STEVEN SCOTT  
Grievor's Name

December 14, 1988  
Grievance Date

Without prejudice and without precedent, the parties agree to the following terms as full and final settlement of the above-noted grievance:

As soon as it can be arranged, but no later than 30 days from the signing of this memorandum of settlement, management will operate one exercise yard with officers assigned as follows:

- A) Outside patrol - one officer
  - B) Observation Tower - one officer
  - C) Inmate escort - one officer
  - D) Yard access door - one officer
- 
- Upon implementing this change, the correctional officer staffing schedule will be changed to reflect the same.
  - Should this settlement not meet the operational mandate to provide all inmates wishing to exercise their right to fresh air, within a time period of six (6) months, both parties may renegotiate this settlement.
  - None of the above precludes managements right to operate two exercise yards simultaneously, if staff is available to do so.
  - The union and the grievor agree to withdraw the above captioned grievance.

...





Subsequently on December 12, 1989, Mr. Hume, the Senior Assistant Superintendent of the Detention Centre, forwarded a memorandum to all Shift Supervisors advising them that in accordance with the settlement reached, perimeter patrols would be reinstituted effective December 18, 1989. In the week prior to December 18th, however, management removed the keys to the huts which had previously been used during such patrols. As a result of this action, Mr. Miller approached Mr. Mulhern who advised him that the huts would remain locked although he would look into the possibility of providing relief in the event that any Correctional Officer experienced discomfort as a result of adverse weather conditions. Mr. Mulhern later informed Mr. Miller that relief would be available to Correctional Officers on perimeter patrols, if requested. Mr. Miller testified, however, that some Correctional Officers and casual Correctional Officers in particular, would be reluctant to request relief in such circumstances.

Thereafter, in late December of 1989, Mr. Miller advised Mr. Mulhern that, in the Union's view, the Employer's action constituted an unfair labour practice and he intended to file a complaint with the Tribunal to this effect. At the hearing, the Union took the position that in locking the huts, the Employer was attempting to penalize employees because Mr. Scott had exercised his right to grieve.



It was the evidence of Mr. Mulhern, however, that the grievance of Mr. Scott had no bearing on the Employer's decision to lock the huts. Instead, Mr. Mulhern testified that management took this action because in the past, there had been reports of employees reading or sleeping in the huts. He also testified that such reports were hard to confirm as it was difficult to see into the huts but Mr. Mulhern believed that one employee had actually been spoken to by a member of management about misuse of the huts. He could not recall when this incident occurred.

Although Mr. Mulhern initially testified that misuse of the huts was not a factor in the decision to eliminate perimeter patrols in November of 1988, he subsequently indicated that this was indeed a consideration. He agreed, however, that misuse of the huts was not raised with the Union either in November of 1988 or when the parties subsequently met in November of 1989 following the adjournment of Mr. Scott's grievance.

Mr. Mulhern believed that the decision to lock the huts was made by Mr. Simpson in December of 1989 just prior to the reinstitution of perimeter patrols. He could not recall being part of the decision-making process, nor could he recall being involved in any discussions concerning the huts at any time. Mr. Mulhern testified that he first learned of the Employer's decision to lock the huts when he was approached by Mr. Miller. As to the Union's concern about Correctional Officers' prolonged





exposure to the elements, Mr. Mulhern testified that relief would be made available and that he so advised Mr. Miller. When questioned as to whether he could think of any other way to alleviate the Union's concern, Mr. Mulhern suggested that perimeter patrols could simply be eliminated.

It was the submission of the Employer that based upon the evidence of Mr. Mulhern, there was a legitimate reason for locking the huts which was unrelated to the grievance of Mr. Scott. For a number of reasons, however, the Tribunal cannot accept the evidence of Mr. Mulhern. Not only were there a number of inconsistencies in his evidence but if the Employer was genuinely concerned about misuse of the huts as Mr. Mulhern suggested, it seems improbable that this would not have been mentioned to the Union during the meeting in November of 1989 at which time the Employer agreed to reinstitute perimeter patrols. More importantly, however, Mr. Mulhern could not recall being involved in any discussions concerning the huts, nor could he recall being involved in the decision to lock the huts in December of 1989. Given the passage of only four months from the date of the Employer's decision to the hearing in this matter, we find it surprising that Mr. Mulhern could not recall whether he was involved in the decision-making process. In any event, on Mr. Mulhern's evidence, there is no basis for concluding that he had any knowledge of the reason for the Employer's decision to



lock the huts. The Employer elected to call no other evidence to explain the reason for its decision.

As to the Employer's motive for locking the huts, we agree with the Union that rarely will an improper motive be admitted. Accordingly, reasonable and necessary inferences can and should be drawn from the evidence in order to assess the motivation of the Employer. Given the sequence of events in this case and the Employer's failure to establish any proper basis for its decision, it is reasonable to infer that the Employer locked the huts with the intent of deterring Mr. Scott or any other employee from pursuing a grievance in connection with perimeter patrols. It may be that the Employer's action in locking the huts also constituted a breach of the Memorandum of Settlement executed by the parties but that is not the issue before the Tribunal.

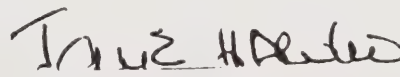
Although the Employer agreed to reinstitute perimeter patrols as a result of the grievance filed by Mr. Scott, Mr. Mulhern, the only witness called by the Employer, expressed the view that such patrols are unnecessary and their elimination does not raise any health and safety issue. When this evidence is considered in the context of the evidence as a whole, it can reasonably be inferred that by locking the huts, the Employer intended to accomplish indirectly that which it had been unable to accomplish directly, i.e. the elimination of perimeter



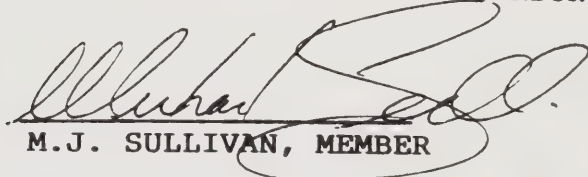
patrols. In other words, the Tribunal finds that by making the conditions under which such patrols were to be performed sufficiently unpleasant, the Employer attempted to ensure that reinstitution of the patrols would not be pursued.

In the Tribunal's view, locking the huts can properly be described as a penalty within the meaning of Section 29(2)(c) of the Crown Employees Collective Bargaining Act and for the reasons set out, we find that this penalty was imposed to deter employees from exercising their rights under the Act and, in particular, their right to grieve. To this extent, the Employer's conduct constitutes a violation of Section 29(2)(c) of the Act. In the circumstances, the Tribunal directs the Employer to rescind the penalty imposed and to grant access to the huts in accordance with past practice. The Tribunal remains seized for purposes of implementation of its decision.

DATED AT TORONTO, this 29 day of May, 1990.



J.H. DEVLIN, VICE-CHAIRPERSON



M.J. SULLIVAN, MEMBER

"I dissent"

W.J. MADIGAN, MEMBER











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T/0057/89

**THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT**

**BEFORE THE ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL**

**Between:**

Anna Cancelli

**Complainant**

**- and -**

James Clancy

**Respondent**

**BEFORE:**

J. Devlin  
M. Sullivan  
C. Boettcher

Vice-Chairperson  
Member  
Member

**FOR THE  
COMPLAINANT:**

H. Kopyto  
Consultant

**FOR THE  
RESPONDENT:**

R. Wells and I. Roland  
Counsel  
Gowling, Strathy & Henderson  
Barristers & Solicitors

**HEARING:**

March 23, 1990  
June 26, 1990





In this matter, Anna Cancelli complains of a breach of the duty of fair representation contained in Section 30 of the Crown Employees Collective Bargaining Act. In particular, Mrs. Cancelli alleges that James Clancy, the President of the Ontario Public Service Employees Union, failed to schedule her classification grievance for hearing before the Grievance Settlement Board.

Mrs. Cancelli is employed by the Ministry of Government Services and her position title is Gazette and Sessional Clerk. On October 12, 1988, Mrs. Cancelli filed a grievance in which she claimed that she was improperly classified at Level 7 of the Office Administration Group ("OAG") and that she ought to have been classified at Level 9. The grievance was subsequently amended to involve a claim for Level 10.

Mrs. Cancelli's grievance was filed at stage one of the grievance procedure where it was denied by the Employer. Thereafter, Mrs. Cancelli informed the Employer that she wished to be represented at the stage two meeting by Jim Glenny, a steward with Local 520. Because Mrs. Cancelli was a member of Local 513, however, and because the Employer understood that Mr. Glenny's authority to represent employees did not extend beyond Local 520, the Employer declined to schedule a stage two meeting until such time as Mrs. Cancelli designated a representative from her own Local.

As a result of the Employer's refusal to schedule a stage two meeting, the Union filed a policy grievance claiming that the Employer had breached Article 27 of the Collective Agreement which provides that an employee may be accompanied by - an employee representative at each stage of the grievance procedure. In addition, on December 13, 1988, Mr. Glenny forwarded Mrs. Cancelli's classification grievance to Terry Krulicki, a Regional Staff Representative with the Union. Mr. Glenny advised Mr. Krulicki that the Employer had refused to schedule a stage two meeting and requested that he apply for a hearing of the grievance before the Grievance Settlement Board. Mr. Krulicki, in turn, forwarded Mrs. Cancelli's grievance to Ivor Oram, then the Acting Co-ordinator of Grievances for the Union and, on December 16, 1988, Mr. Oram forwarded the grievance to the Registrar of the Grievance Settlement Board with a request that the matter be scheduled for hearing.

Mrs. Cancelli testified that she heard nothing further with regard to her grievance and, accordingly, in July of 1989, she telephoned George Richards, a Senior Grievance Officer with the Union. Although she inquired as to the status of her grievance, she testified that Mr. Richards was unable to assist her. As a result, in early August of 1989, Mrs. Cancelli wrote to Mr. Clancy and asked when she could expect her grievance to be scheduled for hearing. As she did not receive a reply to her

letter, she forwarded a further letter to Mr. Clancy in mid-September of 1989.

Mr. Clancy responded to Mrs. Cancelli's inquiry by letter dated October 17, 1989 which was as follows:

"17 October 1989

OPSEU #70494

Ms. Anna Cancelli  
86 Greenlaw Avenue  
Toronto, Ontario  
M6H 3V5

Dear Ms. Cancelli:

Re: Your Letter of August 9, 1989

I understand that the Union referred your classification grievance to arbitration on December 16, 1988. As yet, your case has not been scheduled for hearing because it is one of a great many classification grievances arising under the Office Administration Group plan. Over the last few months, there have been many meetings between representatives of the Union, the Employer, and the Grievance Settlement Board aimed at developing a quick and efficient method of dealing with this large volume of work. It is my expectation that these meetings will lead to the scheduling of a number of cases in the next two or three months. The decisions on these key cases will establish precedents that will enable the parties to review the merits of many other cases and reach settlements without the necessity of a hearing. Those cases which remain unresolved should be heard by the Board over the coming winter. A grievance officer will be contacting you as soon as your case comes up for either negotiations or a full hearing.

I understand that your case was referred to the Grievance Settlement Board before the Employer had an opportunity to address the matter at Step 2. The Board has made it clear in previous decisions that while the premature reference of a case to arbitration will not jeopardize a hearing on the merits, no arbitration hearing can occur before a second stage meeting takes place. I am therefore sending a copy of this letter to your regional staff representative, Terry Krulicki, suggesting that he contact you regarding

establishing a Step 2 meeting with the employer with a view to resolving your grievance.

Yours truly,

"James Clancy"  
James Clancy  
President  
OPSEU

..."

On October 18, 1989, Mr. Richards also wrote to Mrs. Cancelli. He requested that, in preparation for the stage two meeting and for arbitration, she forward to Mr. Krulicki a copy of her grievance, her current position specification and a list of errors or omissions in the specification. In addition, in the event that she intended to argue that she was performing substantially the same work as employees in higher classifications, Mr. Richards suggested that she provide the Union with a list of the names of such employees together with their position specifications.

Mrs. Cancelli testified that she did not forward the documentation to Mr. Krulicki as requested by Mr. Richards because, in her view, this documentation was accessible to the Union and it was the Union's responsibility to gather the information necessary to support her grievance. Mrs. Cancelli testified, however, that she did go to Mr. Krulicki's office and although she left a message for him to telephone her at home, he did not do so.



Thereafter, on November 9, 1989, Mrs. Cancelli again wrote to Mr. Clancy. She expressed the view that her classification grievance was unrelated to any other OAG grievances and should be scheduled for hearing as soon as possible. She also indicated that a stage two meeting had not been held because the Employer refused to recognize Mr. Glenny as her authorized representative as a result of which a policy grievance had been filed. Finally, Mrs. Cancelli suggested that no useful purpose would be served by holding a stage two meeting at that time although she indicated that she was prepared to discuss her classification grievance on a without prejudice basis.

As Mrs. Cancelli received no response to her letter of November 9th, she forwarded a telegram to Mr. Clancy in January of 1990 requesting a reply. When she again received no response, she filed the present complaint.

Mr. Glenny, who gave evidence on Mrs. Cancelli's behalf, testified that the Union processed her classification grievance in a most unusual manner. Firstly, Mr. Glenny suggested that it was unusual for the Union to request that a Grievor, such as Mrs. Cancelli, provide documentation of the nature set out in Mr. Richard's letter of October 18, 1989. Secondly, he shared Mrs. Cancelli's view that her grievance was unrelated to the other outstanding OAG grievances and, therefore,



should have been scheduled for hearing in the normal course. Mr. Glenny suggested that, in these circumstances, a hearing ought to have been held within four to six months of the date the grievance was filed with the Grievance Settlement Board.

Mr. Glenny also disagreed with the suggestion in Mr. Clancy's letter of October 17th, 1989 that there was any necessity to hold a stage two meeting at that point. Mr. Glenny testified that, in fact, as early as February of 1989, the Employer was prepared to recognize him as Mrs. Cancelli's authorized representative and to schedule a stage two meeting. It was Mr. Glenny's view, however, that because Mrs. Cancelli's grievance had already been forwarded to the Grievance Settlement Board and because the Employer had no genuine interest in resolving the matter, there was no purpose in holding such a meeting.

Mr. Glenny attributed the Union's failure to process Mrs. Cancelli's grievance in an expeditious manner to an attempt on the Union's part to penalize Mrs. Cancelli because of her association with him. In this regard, Mr. Glenny testified that he has had certain differences with senior staff members of the Union.

The issue then is whether Mr. Clancy, as President of the Union, breached the duty of fair representation set out in

Section 30 of the Crown Employees Collective Bargaining Act.

This Section provides that an employee organization shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees, whether members of employee organization or not.

In her complaint, Mrs. Cancelli alleges that Mr. Clancy breached Section 30 of the Act by failing to schedule her classification grievance for hearing before the Grievance Settlement Board. The evidence indicates that this grievance was forwarded to the Board in December of 1988 and that a hearing has not yet taken place.

In the circumstances, there can be no question that there has been considerable delay in scheduling a hearing.

Nevertheless, there was no evidence to indicate that the Union is responsible for this delay. When Mrs. Cancelli questioned Mr. Clancy concerning the delay, she was advised that her grievance was one of a great many OAG grievances pending before the Board and that the parties and the Board were endeavouring to establish a procedure for dealing with this large volume of work. It was - Mr. Clancy's expectation that a number of key grievances would be scheduled for hearing and that the Board's determination of these grievances would enable the parties to review the merits of many other grievances with a view to settling these grievances without the necessity of a hearing. Accordingly, Mr. Clancy advised Mrs.

Cancelli that she would be contacted when her grievance was scheduled for discussion between the parties or alternatively, for hearing.

Although Mrs. Cancelli and Mr. Glenny expressed the view that Mrs. Cancelli's grievance is unrelated to any of the other OAG grievances and ought to have been scheduled for hearing in the normal course, they offered nothing in support of their opinion. There was certainly no evidence that other OAG grievances have been scheduled for hearing while Mrs. Cancelli's grievance has not. There was also nothing to support Mr. Glenny's assertion that the Union failed to properly process Mrs. Cancelli's grievance because of her association with him. In fact, the only evidence as to what has occurred since the grievance was filed with the Board can be found in the letter from Mr. Clancy to Mrs. Cancelli which indicates that the Union has been actively involved in meetings with respect to the procedure to be followed by the Board in processing a large number of OAG grievances, including the grievance filed by Mrs. Cancelli. In all the circumstances, therefore, the Tribunal cannot conclude that the Union is responsible for the delay in scheduling Mrs. Cancelli's grievance for hearing or that Mr. Clancy, as President of the Union, has breached the duty of fair representation set out in Section 30 of the Crown Employees Collective Bargaining Act.

There is one further matter which must be addressed and this relates to an alleged failure to provide representation to Mrs. Cancelli at stage two of the grievance procedure. In this regard, the evidence indicates that the Employer initially refused to recognize Mr. Glenny as Mrs. Cancelli's authorized representative. As a result, a policy grievance was filed and certainly, there can be no complaint against the Union in this regard. Although there was some suggestion that Mr. Krulicki later failed to contact Mrs. Cancelli with regard to the stage two meeting, Mrs. Cancelli's chosen representative was Mr. Glenny. Mr. Glenny acknowledged that as early as February of 1989, the Employer was prepared to recognize him as Mrs. Cancelli's representative and to schedule a stage two meeting. It was Mr. Glenny's view, however, that no purpose would be served by holding such a meeting at that time, primarily because Mrs. Cancelli's grievance had already been forwarded to the Grievance Settlement Board.

Mrs. Cancelli advised the Tribunal that she makes no claim against Mr. Glenny in this proceeding and, in our view, there can be no basis for any complaint against Mr. Clancy. It was Mr. Glenny and not Mr. Clancy who decided that a stage two meeting was unnecessary. Although we understand that the parties' failure to hold such a meeting has not affected the scheduling of Mrs. Cancelli's grievance to date, it will ultimately be for the Grievance Settlement Board to determine

whether the hearing can proceed when the grievance has not been processed through all of the steps of the grievance procedure. In any event, for the reasons set out, we find that Mr. Clancy did not breach the duty of fair representation as alleged and the complaint of Mrs. Cancelli is hereby dismissed.

DATED AT TORONTO, this 10<sup>th</sup> day of September, 1990.

John H. H. H.  
Vice Chairperson

"M. Sullivan"  
Member

"C. Boettcher"  
Member









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T/0060/89-1

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THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

BEFORE

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

BETWEEN:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

**Applicant**

- and -

THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED  
BY METROPOLITAN TORONTO HOUSING AUTHORITY AND  
COMMUNITY GUARDIAN COMPANY LIMITED.

**Respondents.**



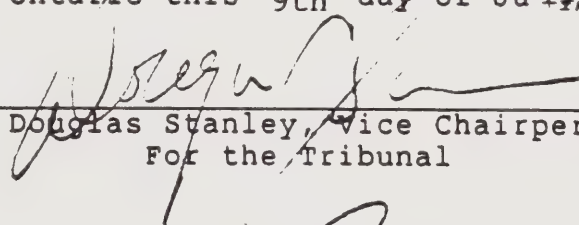
Re: T/0060/89 Ontario Public Service Employees Union  
and The Crown in Right of Ontario (Metropolitan  
Toronto Housing Authority) and Community Guardian  
Company Limited


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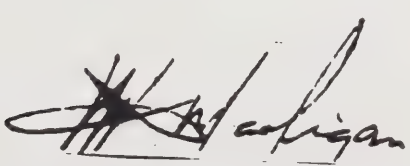
A pre-hearing vote is ordered in the above mentioned  
matter and is referred to the Registrar.

Reasons for the decision of the board will follow.

DATED at Toronto, Ontario this 9th day of July, 1990

  
\_\_\_\_\_  
Douglas Stanley, Vice Chairperson  
For the Tribunal

  
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Micheal Sullivan, Member  
For the Tribunal

  
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William Madigan, Member  
For the Tribunal











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T/0060/89

**CROWN EMPLOYEES COLLECTIVE BARGAINING ACT, R.S.O. 1980, C.108**

**ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL**

**Between**

**APPLICANT:** Ontario Public Service Employees Union

- and -

**RESPONDENT:** The Crown in Right of Ontario as represented  
by Metropolitan Toronto Housing Authority and  
Community Guardian Company Limited

- and -

**INTERVENER:** Canadian Union of Public Employees, Local 767

<b><u>BEFORE:</u></b>	D. Stanley	Vice-Chairperson
	M. Sullivan	Member
	W. Madigan	Member

<b>FOR THE</b>	I. Roland & N. Coleman
<b>APPLICANT:</b>	Counsel
	Gowling, Strathy & Henderson
	Barristers & Solicitors

<b>FOR THE</b>	M. Fleishman
<b>RESPONDENT</b>	Law Officer
<b>METROPOLITAN</b>	Crown Law Office - Civil
<b>TORONTO HOUSING</b>	Ministry of the Attorney General
<b>AUTHORITY</b>	

<b>FOR THE</b>	J. B. Casey
<b>RESPONDENT</b>	Counsel
<b>COMMUNITY GUARDIAN</b>	Gardiner, Roberts
<b>COMPANY LIMITED</b>	Barristers & Solicitors

<b>FOR THE</b>	R. Carnovale
<b>INTERVENOR</b>	National Representative
	CUPE, Local 767

**HEARING:** May 25, 1990

This Application for Representation Rights, dated February 23, 1990, came before this Tribunal on May 25, 1990, for consideration of the applicants request for a pre-hearing vote. In the application it is alleged that the Respondent employer, Community Guardian Company is, by virtue of it's relationship with Metropolitan Toronto Housing Authority, a "crown agency". Other matters before this Tribunal involving these parties, which need not be dealt with here, influenced the progress of this application.

At the hearing counsel for the Respondent Community Guardian, and the Crown, and for the Intervener, CUPE, argued that the Tribunal could not direct a pre-hearing vote without first deciding preliminary issues of the status of the Respondent, and of the employees who are subject to the application. More particularly whether Community Guardian is an agent of the Crown and it's employees are "employees" under the *CROWN EMPLOYEES COLLECTIVE BARGAINING ACT*.

The Tribunal issued an order on July 9, 1990, directing that a pre-



hearing vote take place, prior to any determination of the status of employees, and advising that the reasons for the decision would follow.

This Tribunal administers the *CROWN EMPLOYEES COLLECTIVE BARGAINING ACT*, which defines "crown employees", it is trite to say that we only have jurisdiction over those employees. Whether a person is a crown employee or not is a question of applying the statutory definitions to the facts of that persons employment. In some cases, as the one before us, it involves deciding whether an employer is an agent of the Crown. Section 39 of the statute reads as follows:

39. The Tribunal has exclusive jurisdiction to exercise the powers conferred by this Act and to determine all questions of fact and law that arise in any matter before it, and, except as otherwise provided in this Act, the action or decision of the tribunal thereon is final and binding for all purposes,

.....

Counsel for the Crown and Community Guardian submitted to us that, despite this clear statutory provision, we ought to follow a 1963 decision of the Court of Appeal, *REGINA v. ONTARIO LABOUR RELATIONS BOARD, Ex Parte ONTARIO FOOD TERMINAL BOARD*, (1963), 2 O.R. 91 (C.A.). There are two aspects of this decision relied on by counsel. The first is the suggestion that the Tribunal is without jurisdiction to decide the matter of status. In the Food Terminal case the court held that the decision as to status was a pure question of law and one that could only be taken by a court constituted pursuant to s. 96 of the *British North America Act*, in other words a federal court. The second aspect of the decision relied on was the suggestion in the decision that the proper course for the

Board to have followed, in the face of a challenge to its jurisdiction, was to stay the matter and refer the issue to the courts for determination.

The Ontario Food Terminal case seems to be at odds with an earlier decision of the Privy Council which reviewed the jurisdiction of the Saskatchewan Labour Relations Board against S. 96 of the *BNA Act*, *LABOUR RELATIONS BOARD OF SASKATCHEWAN v. JOHN EAST IRON WORKS*, [1948] 4 D.L.R. 673. Even Counsel for the employer acknowledges that it was immediately questioned in *REGINA v. ONTARIO LABOUR RELATIONS BOARD, EX PARTE TAYLOR*, (1963) 1 O.R. 173 (H.J.C.); and not followed in *RE ARMSTRONG TRANSPORT v. ONTARIO LABOUR RELATIONS BOARD*, (1963) 42 D.L.R. (2d) 217 (O.H.C.J.).

Both aspects of the Food Terminal case have been superseded by administrative law decisions of the Supreme Court of Canada through the 1970's and into the 1980's. The very basis of the approach taken in the Food Terminal case, of characterizing certain matters as "preliminary" or as "collateral to jurisdiction is questioned by the Supreme Court of Canada in *NEW BRUNSWICK LIQUOR CORPORATION v. CUPE, LOCAL 963*, (1979), 25 N.B.R. (2d) 237 (S.C.C.). The "standard of review" has also seen a dramatic reversal, from the expressions of "judicial superiority", characterized by Justice Laidlaw's opinions in the Food Terminal case, to "judicial restraint" and deference to the jurisdiction of the Administrative Tribunal. See for example *BELL v. ONTARIO HUMAN RIGHTS COMMISSION*, [1971] S.C.R. 756; *METROPOLITAN LIFE INSURANCE COMPANY v. INTERNATIONAL UNION OF OPERATING ENGINEERS*, [1970] S.C.R. 425.

The very question which counsel for the employer argues is a judicial matter, over which we have no jurisdiction - the alleged status of an employer as a crown agent, was characterized by the Divisional Court as being essentially a factual matter in a recent case, *RE ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL AND McKECHNIE AMBULANCE SERVICE INC.*, (1987) 62 O.R. (2d) 108. The Court also said, very specifically, in that judgement that the Tribunal ought to exercise its jurisdiction to determine status prior to any judicial review of the matter.

The idea expressed in the Food Terminal case that a Labour Relations Board should stay the substantive matter before it pending a decision of the courts on jurisdiction has been completely disregarded in practice by all Boards in the public and private sectors. Indeed the courts now accept the theoretical underpinning for that practice - the view that delay in industrial relations matters leads to a denial of rights. (see comments of Estey C.J.O. in *Journal Publishing Company of Ottawa Ltd. v. Ottawa Newspaper Guild*, March 31, 1977) This view is reflected in the practice of the Ontario Labour Relations Board in handling pre-hearing vote applications. That practice is explained in *Emery Industries Ltd.* [1980] OLRB Rep. Mar. 316, where the Board said:

It is axiomatic that in industrial relations matters "time is of the essence"; but this is especially the case in respect of representation votes. If the trade union's certification application, and its status as bargaining agent, are not resolved expeditiously (i.e. if it cannot engage in collective bargaining, or perform the other representational functions

for which it was selected) there may be discontent among its supporters and a possible erosion of that support. This might not only make the union's certification more difficult, but could also complicate its collective bargaining task. The purpose of the pre-hearing, or "quick vote" procedure is to facilitate a prompt resolution of representation questions, by permitting the Board to test employee wishes as soon as possible following the application date. This avoids the potential prejudice which might arise if a representation vote had to await a decision following a formal certification hearing. Some delay is inevitable, but the pre-hearing vote procedure is a legislative attempt to remove some of the problems, and prejudice, associated with delay while, at the same time, ensuring that all of the parties will be given a full opportunity to make their submissions with respect to any matters in dispute."

The OLRB has affirmed this approach in *ST. CLAIR COLLEGE OF APPLIED ARTS AND TECHNOLOGY*, [1984] OLRB Dec. Rep. 1776; *KENTING EARTH SCIENCES LTD.*, [1985] OLRB Rep. Feb. 293; and *CORPORATION OF THE CITY OF GLOUCESTER*, [1989] OLRB Rep. Apr. 352.

There is a case where the Board declined to order a pre-hearing vote prior to dealing with substantive issues - *THE SOCIETY OF ONTARIO HYDRO PROFESSIONAL AND ADMINISTRATIVE EMPLOYEES, APPLICANT v. ONTARIO HYDRO, RESPONDENT v. CUPE, LOCAL 1000, INTERVENER*, Dec. 21, 1987 (2241-86-R). It was largely on the basis of administrative expediency that the Board did not order a vote in that case. They did review and affirm all the earlier Board jurisprudence on the issue and in particular the opinion expressed in *Emery Industries* quoted above. The case simply exemplifies the fact that it is a Board discretion to order a vote, and that there will be situations where they will refuse to exercise that



discretion. None of the factors that influenced that decision are present in the case before us.

The legislative objective of providing a pre-hearing vote in the *Crown Employees Collective Bargaining Act* is of course the same as in the *Labour Relations Act* and we adopt the view expressed by the OLRB in *Emery Industries* as being equally applicable to our practice. For us to stay the direction of a pre-hearing vote to hear argument challenging the status of the applicant, the employees or alleged employer, is to deny any efficacy to the pre-hearing vote provided by the legislature to combat the very evil which had resulted from such challenges. The whole object of the pre-hearing vote is to capture the desire of employees prior to, and uninfluenced by, delays in the process. The interests of those opposed to the application are protected by the fact of the ballots being sealed and by having the opportunity for a full hearing on their objections prior to a determination as to whether the ballots will be considered by the Tribunal.

The Representative of CUPE argued that the application was not timely in so far as CUPE has representation rights for "all persons employed in the work of Ontario Housing Corporation within the Municipality of Metropolitan Toronto". This unit was found to be appropriate by this Tribunal (differently constituted) in 1973. CUPE claims to have an existing collective agreement covering the employees sought to be represented by the applicant. They take the same position as the Crown, that until the issue of status of the employer and of the employees is determined no vote should be ordered. They argued, in the



alternative, that if a vote were to be ordered that they had a right to appear on the ballot.

We are satisfied that the interests of the Intervener are not prejudiced by the ordering of a pre-hearing vote. The vote is not in any way dispositive of the substantive issues argued by them. The issue of timeliness like the issue of status can be dealt with at a subsequent hearing. Their rights can be further protected by their inclusion on the ballot.

## DECISION

For all the above reasons the Board directed on July 9, 1990, that a pre-hearing vote take place. We add to the direction given on that day the following:

Further to the provisions of Section 5 (2) of the *CROWN EMPLOYEES COLLECTIVE BARGAINING ACT* and having regard to the submissions of the parties, the Labour Relations Tribunal determines the following voting constituency:

"All employees of Community Guardian Company Limited save and except those persons who are not employees within the meaning of clause (f) of subsection 1 of section 1 of the *CROWN EMPLOYEES COLLECTIVE BARGAINING ACT*, R.S.O. 1980, c. 108, as amended."

On an examination of the records of the applicant and the employer, it appears to the Tribunal that not less than 35% of the employees in the voting constituency were members of the employee organization at the time the application was made.

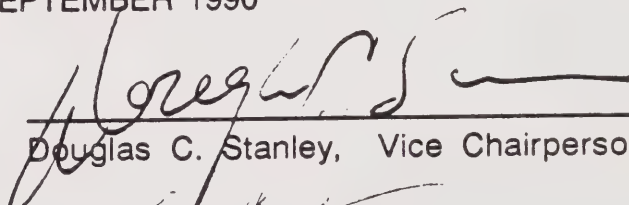
Accordingly, and having regard to the further provisions of subsection 5 (2) of the Act, the Tribunal directs that a representation vote be taken among the employees in the voting constituency. Pursuant to subsection (4) of section 41 of the Act the Tribunal directs that the ballot allow employees to indicate whether they wish to be represented by an

employee organization, and if yes, whether they wish to be represented by the Applicant, OPSEU, or by the Intervener, CUPE.

The Tribunal directs that on the taking of a pre-hearing vote, the ballot boxes shall be sealed and that they not be opened until the parties have been given a full opportunity to present evidence and make submissions.

This matter is referred to the Registrar

DATED THIS 28th DAY OF SEPTEMBER 1990



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Douglas C. Stanley, Vice Chairperson

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Michael Sullivan, Member

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William Madigan, Member









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T/0063/89

**IN THE MATTER OF A COMPLAINT**

**Under**

**THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT**

**Before**

**THE LABOUR RELATIONS TRIBUNAL**

**Between:**

**Ontario Public Service Employees Union (Millar)**

**Complainant**

**- and -**

**The Crown in Right of Ontario  
(Ministry of Natural Resources)**

**Respondent**

**BEFORE:**

<b>D. Stanley</b>	<b>Chairperson</b>
<b>P. O'Keefe</b>	<b>Member</b>
<b>R. Redford</b>	<b>Member</b>

**FOR THE  
COMPLAINANT:**

**A. Ryder  
Counsel  
Ryder, Whitaker, Wright & Chapman  
Barristers & Solicitors**

**FOR THE  
RESPONDENT:**

**P. Pasieka  
Counsel  
Winkler, Fillion & Wakely  
Barristers & Solicitors**

**HEARING:**

**July 13, 1990  
November 30, 1990  
December 19, 1990  
April 18, 23, 1991**



This is a complaint brought by OPSEU on behalf of Jim Millar alleging that Ken Yaraskavitch, Forest and Parks Supervisor, MNR, Chatham District, violated provisions of the CECBA. The particulars of the Complaint are set out as follows:

1) On January 3, 1990, the grievor was called in to Mr. Ken Yaraskavitch's office for a discussion. During this meeting, the grievor (Jim Millar) was advised he was to receive some type of discipline. The grievor's request for Union Representation was denied. The grievor was subsequently sent home. During this meeting, the grievor alleges he was threatened and intimidated by Mr. Ken Yaraskavitch. [Violations Sec. 29(1) - 29(2)(c) and 37 (1)(d)]

2) On January 3, 1990, the grievor met with the Employer at Step One of the grievance filed for unjust suspension/discipline. The grievor was represented by his Unit Steward, Marg Reed (President of Local 130) and Gerry Layden (Staff Representative). Management present were Mr. Ken Yaraskavitch and Mr. A. Carr. At this meeting, it was agreed that Jim Millar would return to work at regular time. Mr. Yaraskavitch then informed the grievor and Union that he would be calling Jim into a meeting on the morning of January 4, 1990, and that there would be discipline of some kind flowing from that meeting. The Union responded that it was impossible for Jim to have either his Unit Steward or Staff Representative available at that time and proposed a meeting on the 5th of January or some time mutually agreeable the following week. Employer refused and stated that Jim could use another Steward who was not his Steward, and in any event, they were proceeding. We believe the employer has violated Secs. 29(1) - 29(2)(c) and 37(1)(d).



The sections of the Crown Employees Collective Bargaining Act alleged to have been violated are as follows:

29.—(1) No person who is acting on behalf of the employer shall participate in or interfere with the selection, formation or administration of an employee organization or the representation of employees by such an organization, but nothing in this section shall be deemed to deprive the employer or any person acting on behalf of the employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

29.—(2) The employer or any person acting on behalf of the employer shall not,

- (c) seek by intimidation, by threat of dismissal or by any other kind of threat or by the imposition of a pecuniary or any other penalty or by any other means to compel an employee to become or refrain from becoming or to continue or to cease to be a member of an employee organization, or to refrain from exercising any other right under this Act; or

37.—(1) The employer or any person acting on behalf of the employer shall not,

- (d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of a belief that he may testify in proceedings under this Act or because he has made or is about to make a disclosure that may be required of him in a proceeding under this Act or because he has made an application or filed a complaint under this Act or because he has participated or is about to participate in a proceeding under this Act.

The Union's case rests on the proposition that access to the Health and Safety Committee and its operation is a union activity—that it is one of the avenues through which employee's are represented and their interests protected. It is their contention that Yaraskovitch's actions, resulting from Millar sending a memo to the



health and safety committee, constitute reprisals or interference with these union rights, and that it violates s. 29(2)(c) of the Crown Employees Collective Bargaining Act. Counsel argues that this conduct is consistent with a management practice of interfering with all kinds of union representation in the work place. (such as prohibiting Millar from using the phone for personal calls and a January 26, 1990 incident where Yaraskavitch allegedly ignored Marg Reed efforts to represent an employee at a grievance meeting)

Counsel submits that it is not necessary to find that Yaraskavitch was disciplining the complainant; that their argument is that managements response to Millar's memo to the Health and Safety Committee was intended to inhibit employees from exercising rights to go directly to the Health and Safety Committee with concerns.

Counsel for the Employer asks that we dismiss the complaint on the preliminary motion made as none of the facts alleged, and subsequently proven in evidence, support a conclusion that there was a violation of the Act. On that preliminary motion counsel argued that s. 29(2)(c) relates to the object of a threat and the facts alleged do not disclose any objective in relation to the alleged threat.

The facts relevant to the issue are as follows:

Millar has been an employee in the Forest Resources Section since 1975. Part of his seasonal work involves a MNR tree plantation spray program operating a 4-wheel drive ATV pulling a sprayer. Millar had expressed concerns about safety aspects of the program in the past and Ron Ludolf, his Supervisor, suggested he send a memo to the Health and Safety Committee regarding those concerns. He sent a memo Dated December 8, 1989, to the Chairman of the Health & Safety Committee for discussion at a Health & Safety Meeting. That Memo reads as follows:

I feel that the ATV spraying system is basically unsafe. Last Spring the operator had the sprayer roll over. One has to remember that you are pulling a sprayer with 66 gallons of chemical and a hot gasoline motor. In most cases you are spraying over a property that has tall weeds that impair vision, large wash-outs, creeks, thorns etc.. If the right conditions occur the sprayer controls will strike the operator in the back which could throw the operator off the ATV. The ATV spraying renders the Melio program ineffective because it creates a ditch which is dangerous to the operator; so the ditch can only be made going with the row of trees. I recommend that safety personnel look at some of the properties first hand. I would be glad to provide them with a list.

A separate issue that must be addressed is the attitude of the supervisors. I asked for and received some safety equipment for the operation of the ATV. When the spray program started both supervisors stated that "aspirins would kill me faster than the chemical we were using". I was told the equipment they provided me was not necessary to wear according to the chemical fact sheets, and would be uncomfortable to wear but that was up to me as long as production did not decline.

My immediate supervisor at the time showed much frustration toward me because I chose to wear all the safety equipment I asked for.

The supervisors referred to in the memo were John Meltz and Ron Ludolph. Art Carr, the District Administrative Supervisor, who was a member of the Health & Safety Committee at the time said that this memo — “about the safety of a piece of equipment ... that had caused an accident and slight injury” — would not normally go to the Health & Safety Committee but would normally go directly to an employees supervisor.

Yaraskavitch saw this memo December 8th. on Ludolph’s desk and made a copy of it. The Health & Safety Committee met on the 8th. and referred the memo to Yaraskavitch, “for appropriate action”. He was given a copy officially by Ludolph, acting for the Committee, on December 11th. Yaraskavitch said that he had a conversation with Ludolph concerning the content of the memo, as well Ludolph told him about a conversation Ludolph had with Millar. As a result of speaking with Ludolph, Yaraskavitch decided to have a meeting with Millar as soon as possible; that meeting was scheduled for December 13, 1989. From Millar’s point of view this was not a constructive meeting. He said, “the way the matter was being put I felt no use putting up much argument or fight”, and that in the end he had said overall he thought the program was safe, “because I just wanted to get out of the room”.

The meeting of December 13th was followed up by a four-page single space letter from Yaraskavitch to Millar which can only be described as an attack on the messenger. It offers a complete justification for all the alleged safety deficiencies. Among other things Yaraskavitch explains to Millar that the comment made by his supervisor about aspirin, and raised by Millar as an example of the supervisor’s attitude toward safety, was simply, “to put the relative toxicity of some common house-hold products and Princep Nine-T into perspective”. Millar said that the letter did not accurately reflect the concerns he raised at the meeting, he said in testimony, “I just shook my head at it”.



Millar's comment in the memo to the Safety Committee about the possibility of the ATV operator being struck by the sprayer control was of particular interest to Yaraskavitch, two pertinent paragraphs from page four of his letter reads as follows:

Your third safety concern related to the possibility of sustaining a back or falling injury while spraying. You stated that, "If the right conditions occur the sprayer controls will strike the operator in the back which could throw the operator off the ATV." This is both a new and potentially serious concern which you had not previously reported. Upon checking with all four previous ATV operators on staff including yourself, we find that while it is a very rare event two operators, yourself and Norm Dumouchelle (our tallest operator) have had their backs struck by the sprayer controls. No one has been thrown from the machine as a result.

During our discussion on December 13th, you stated that it happened to you once this year and that "it was like getting kicked in the back". As this sounds like a potentially very serious problem, I have requested that an accident investigation be conducted to determine precisely how you were struck so that a solution can be found to the problem. When I asked you why you didn't report this accident when it occurred your response was, "It wasn't an accident, it was an incident". I again told you to report accidents and incidents when they occur.

In fact it was not a new concern. It was reported by Dumouchelle to his Supervisor a year earlier, a fact which Yaraskavitch was only later able to confirm, although he clearly knew of the earlier incident when he wrote the letter. Referring to the incident as, "a very rare event", in the same sentence as acknowledging that it happened to two out of four operators, and seeming to suggest that Dumouchelle's height was somehow a factor worthy of note, is a reflection of an attitude running through the letter. Faulting Millar for not filing a report, rather than focusing on the substance of the issue raised set the pattern for the future dealings on the issue.

At the meeting on the 13th. Yaraskavitch told Millar he would be asked to file a report on the incident of being struck on the back. Yaraskavitch asked Ludolph to investigate the incident, and told him to instruct Robinson-Bayes, who was then Millar's Supervisor to ask Millar to file a, "Supervisors Accident Investigation Report". Yaraskavitch conceded that the "Supervisors Accident Investigation Report" contemplates damage to property or injury to persons and that neither was in issue in the incident as reported by Millar. In any event Millar complied with the direction and completed the form with a small sketch. This form was then used by Yaraskavitch as the basis of a charge against Millar for providing false information.

Yaraskavitch was provided with a copy of the "Supervisor's Accident Investigation Report" on December 18, 1989. Yaraskavitch put some questions in a memo to Robinson-Bayes about the sketch of the ATV and spray unit, which Millar had provided. Ludolph, who had already been asked to investigate the accident, staged a "demonstration" on December 19, to determine what position the control bar would have to be in to strike the operator. Yaraskavitch drew a conclusion from this demonstration, in Millar's absence, that Millar could not have been struck in the manner he depicted in the diagram on his report and in his verbal descriptions. On December 21, he received a memo from Robinson-Bayes answering his earlier questions. He was told in the memo that: "It was determined by Milch/Boothby 89-12-19 that the sprayer and ATV would have to be in a ditch for contact to be made, i.e. rough ground wouldn't do it".

It is interesting to note that all this was being done when it was clearly known to Supervision, as a result of Norm Dumouchelle reporting an earlier incident, that there was a possibility of the control bar striking the operator in the back. Which is all that Millar reported in his memo to the Health & Safety Committee in the first



place. No action was taken as a result of Dumouchelle's report, and he does not appear to have been asked any follow up questions, or asked to file a Supervisor's Accident Investigation Report.

As a result of drawing conclusions from the demonstration conducted by the Supervisors Yaraskavitch sent a memo asking for the diagram in Millar's report to be "corrected". He received a second version on January 2, 1990. As a result of receiving all this information Yaraskavitch decided he had to meet Millar. He prepared notes for this meeting which were entered into evidence. There is only one way to describe these "notes", they are a prepared cross-examination that pick out inconsistencies from the various reports he has received. For example the following appears from the prepared notes:

First diagram depicted ATV striking an anthill on fairly flat ground.  
Second diagram depicted ATV travelling on very rough ground (there are very few sites as rough as depicted)

Yaraskavitch even plans to employ the trick of getting Millar to confirm what Yaraskavitch believes to be incorrect, then showing it to be incorrect, and inviting Millar to change his story, as the following prepared questions demonstrate:

I am puzzled why you can't remember where or when it happened, or the weather etc. but can remember speed, sitting position, travelling straight at the time, while spraying and that you were hit in the kidney area, middle of lower back.

Describe accident as he depicted it. Explain to him why it couldn't have happened that way. If, however, he was travelling through a very steep ditch it could have happened, but even then he'd be struck (if struck) not in the lower back area but in the shoulder area.  
(I DREW A SKETCH TO ILLUSTRATE)

In addition to these preparation notes, in which Yaraskavitch recorded some of the answers given to the questions, he prepared notes after the meeting in which he refers to this cross-examination as a discussion. These notes were entered into evidence, they read as follows:

- I was discussing with Jim Millar in private in my office this date, starting at 8:05-8:10 the ATV back/control bar accident
- Halfway through the discussion and at the point where I informed Jim that "I will now be providing you with an oral warning", Jim interrupted me immediately when he heard the words oral warning (now 8:25);
- He put both hands on the arm of the chair as if to get up;
- And said, "I'm not staying hear [sic] without a Union Steward;
- I said, "Remain seated Jim";
- he proceeded to get up and took a couple of steps to my closed door;
- As he was doing so I said, "Jim if you leave your [sic] expelled".
- He did not stop;
- As he proceeded out the door I said, "You're expelled";
- I immediately went to check with Wendy and Art Carr - neither was in;
- I then called Ron Ludolph and informed him to hold Jim in the office until further notice;
- I wrote the attached note, after showing it to Wendy I went to the forestry office and handed it to Jim;
- Jim read it and I walked behind him to ensure that he left the premises;
- I then informed Ron Ludolph and John Robinson-Bayes that Jim was expelled until further notice;

The note which is referred to as having been given by Yaraskavitch to Jim reads as follows:

Jim - You are expelled from the workplace until further notice for insubordination.

Yaraskavitch gave oral testimony about this incident. Regretfully we have to conclude the testimony is so at odds with the facts as to be unbelievable. The note could not be more clear — Millar is being “expelled” for insubordination. Yaraskavitch told the Tribunal that he intended only to remove Jim from the work place, “to provide Jim and I a chance to cool down”. He said that it was not intended that the expulsion would result in any loss of pay or benefits, but that he did not have enough time to explain that to Jim. Further, and more incredibly, that he gave the above note to Jim, “expecting him to ask what it meant so I could discuss it in a non-confrontational mode”. We can not believe that a manager would give an employee a note saying he is “expelled for insubordination” in order to initiate a non-confrontational discussion. If Yaraskavitch truly had an explanation ready in his mind — to the effect that expulsion did not involve a loss of pay or benefits — we can not understand why this would not have been written in the note which he had time to compose since Millar was, at Yaraskavitch’s direction, “being held” elsewhere.

Yaraskavitch said that his expelling Millar was in accordance with Ministry Policy. The Ministry Policy statement on “Progressive Discipline” refers to a “suspension pending investigation”, in cases where “circumstances dictate”. None of the explanations given by Yaraskavitch for his actions involved the need to remove Millar from the work place pending an investigation and no “investigation” was ever done.

We can only conclude that Yaraskavitch acted precipitously in expelling Millar, discovered Millar could only be away from the work place without loss of pay and benefits, and then realized he had to get Millar back. Why else the phone call to Millar’s home within an hour of expelling him, and immediately after speaking with the District Manager, when Yaraskavitch says his purpose in sending him home was to let him cool off.



Millar did not go home and was not there when Yaraskavitch called. He went to his union office where he met Murray Leydon, a Staff Representative. They contacted Marg Reed, President of Local 130, who phoned the District Manager to say that Millar was available to return to work, and asked for a meeting. No firm date was set for the meeting. Reed hand delivered a grievance alleging an unjust suspension, to the employer's office. Later that day a meeting was arranged for 2:00 P.M., this meeting was attended by Millar, Leydon and Reed on the one side and Yaraskavitch and Carr representing Management.

Yaraskavitch attempted to explain to Millar and the Union representatives that Millar was not suspended but "expelled", and that it was not a disciplinary action. He also informed them that he intended to reconvene the meeting which Millar had left the next morning at 8:00 A.M.. He said that Millar was not entitled to Union Representation at this meeting but that he would be allowed to have a Union Representative present, "as an observer only". There was some discussion about the availability of Reed and Leydon the next morning; Millar said that he was not willing to postpone the meeting until the 8th, the next day on which Reed was available, and said that Millar could be represented by someone else.

The next morning Millar appeared for the meeting without a Union Representative, advised Yaraskavitch he was attending "under protest", and said that he felt he had a right to Union Representation. Yaraskavitch said in testimony that he was aware Millar was uncomfortable about the meeting proceeding without Union Representation but that he saw no reason to postpone it. When asked in testimony why the meeting could not have been postponed a few days he simply said, "he had left the meeting and the meeting was not over". The conclusion we reach, on all the evidence, is that Yaraskavitch was determined that Millar would not return to work until he returned to the meeting he had walked out of.

Millar's testimony about the meeting on the 4th was as follows:

I was disciplined for not providing correct information on the ATV incident, that I sent the Ministry on a wild goose chase, wasted valuable Ministry time and equipment on an incident that never occurred. Therefor I could not be trusted so all my work would be closely monitored, all my reports, time sheets, expense accounts. I was also disciplined for walking out on Ken: told I was to be polite, courteous to all supervisors, if I wasn't they would take action. He said it was sad to see I had fallen to a low level in his eyes and that these disciplinary actions were designed to make me a better public servant. He said he was not afraid of a grievance or the paper work they created or any actions I might take.

As an Employee I feel I was singled out, I have been a Union Steward and a lot of derogatory statements have been made towards the Union and that our shop would be a better place without the Union. Ron Ludoph and John Meltz said that many times.

There does not appear to have been any purpose to this meeting other than to further harass and intimidate Millar. Yaraskavitch said that he wanted the meeting to get Millar's explanation of why he left the meeting the previous morning. On the other hand he admitted he knew why Millar left the meeting. Indeed one would have to be incredibly obtuse to not understand that. According to Yaraskavitch two points were made by him at the meeting on the 4th.. First Yaraskavitch told Millar his conduct was unacceptable, that he is being warned about it, and that he would be getting a letter of reprimand. Second, Yaraskavitch told Millar that he was being given an "oral warning regarding the provision of false/misleading information" and that the matter of the ATV incident is closed and that the "Supervisor's Accident Investigation Report" would not be processed any further and that it would not go to the Health and Safety Committee for review.

In effect Yaraskavitch closes the circle — Millar was asked to make a report to the Health and Safety Committee; he reports a problem which the Committee



refers to Yaraskavitch; Millar is told by Yaraskavitch that he should have filed a Supervisor's Accident Investigation Report; Millar does that; he is challenged on that report; he is accused of providing false and misleading information and told that his report will go no further.

Yaraskavitch's cross examination on the possible effect of these his actions is as follows:

You quashed his report, you did not send it to Health and Safety?

- Yes, I couldn't allow it to go further if I didn't believe it happened

But you knew he was hit?

- Yes

So why not let it go forward?

- Well it would have been a double jeopardy for him it would have accomplished nothing Health and Safety would have been an undue punishment.

Well, you knew he was hit?

- Well, I had some reservations.

But you knew it was possible?

- Yes

You knew Norm was hit?

- Yes

And the [spray] arm was relocated?

- Yes

So it was a good thing he raised it?

- I sent another report to the Health & Safety Committee.

Millar's report was intercepted by you?

- I as the responsible manager ceased the report.

So you replaced his report with yours, they got your version not Millar's?

- If you put it that way, I guess yes.

Can we agree all these things that happened to Millar are likely to discourage staff from filing reports?

- No, absolutely not.

Millar later received the letter of reprimand which on January 4th he was told was coming. The first paragraph of the letter states it is a "warning which is non-disciplinary". Clearly this is simply an attempt to keep the matter out of the grievance process. The real import of the letter is clear from the following paragraphs where Millar is told that his actions "constituted insubordination which cannot be tolerated", and that "any other insubordinate, rude or uncooperative behaviour, may result in disciplinary action". Yaraskavitch conceded that these were serious charges, and said the letter would remain in his own file on Millar and that it could be used against him in the future if a decision was being made on his career or on discipline.

Counsel for OPSEU argues that Yaraskavitch's treatment of Millar is bound to discourage any employee from taking a health and safety complaint to the Health & Safety Committee. Further, that it was a response to Millar's memo to the Committee which was calculated to interfere with his access to that committee and its operation. Counsel submits that the Health & Safety Committee is one of the vehicles through which the interests of employees is represented and that it is a Union Activity protected by CECBA. He submits that Yaraskavitch's actions were a reprisal or an interference with Millar's Union rights.

Counsel for the Ministry pointed out first of all that if the central issue relates to access to the Health & Safety Committee, that was not raised specifically in the Complaint. Further, in Counsel's opening statement it was the meetings of January 3—4 which were in issue not that there was interference with Millar's access to the Health & Safety Committee. Counsel submits that there are no facts which would

support a conclusion that there was a violation of s.29(1), and that to find a violation of s.29(2)(c) there must be found some objective to a threat being made, and nothing in the allegations relate to an objective of the alleged threatening behaviour.

Counsel for the Ministry points out that Reed was a member of the Health & Safety Committee and was free to raise the issue of the safety of the ATV program but never did. Counsel argued that the Applicant is attempting to shape the facts to fit a case under s. 29. She argues that Millar was obliged to file a report on the incident, as Yaraskavitch had a right to demand, and that he had an obligation to do that correctly and truthfully. She submits that it was Millar who did not take the matter seriously, and that he was misleading in the information he provided. She argues that there was nothing malevolent in Yaraskavitch challenging the information being provided and that he was being responsible in considering the matter to be very serious. Neither was it improper for him to substitute his own report for that of Millar. She submits that Millar was not denied access to the Health & Safety Committee, but was simply asked to follow the proper procedure of reporting an accident directly to his Supervisor.

Counsel for the Applicant introduced evidence of other incidents, which he submits were of a similar nature, and which, he argues, support a conclusion that there is a practice of interference in employee's rights to union representation. We heard the evidence of other incidents. It demonstrates a paucity of mutual respect in this office. However, it does not relate to the incident which in the end became the focus of the Complainant's case. We have not considered that evidence in drawing our conclusions with respect to the central event relied on by Counsel for the Applicant as being a violation of the Act.

With respect to the Employer's argument that the focus of the argument on access to the Health and Safety Committee has come late in the process, we would



note that in his opening statement counsel for the Applicant said he intended to present evidence that actions taken by management on January 3—4 were reprisals for Millar having spoken out on Health and Safety matters, and that a secondary aspect of the case was interference in representation rights.

We accept the fundamental underpinning to the Union's case that participation in, and access to the Health & Safety Committee is an activity protected by CECBA. Health and Safety is not a matter reserved exclusively to the Employer by s.18, it is an area where the Employer has agreed with OPSEU to joint responsibility and they have established a joint Health & Safety Committee with representation from OPSEU. Millar is or has been a Union Steward and the issues he was raising with respect to the safety of the ATV program were general in nature, having to do with all employees not him alone.

We find a violation of s. 29(1) in so far as Ken Yaraskavitch, acting on behalf of the Employer, interfered with the representation of employees by OPSEU, by his actions in relation to Millar's memorandum to the Health & Safety Committee.

We find that Yaraskavitch's actions amounted to intimidation designed to compel Millar to refrain from speaking out on Health & Safety matters and raising those matters with the Health & Safety Committee, rights which we conclude are protected under CECBA. This constitutes a violation of s. 29(2)(c).

The Respondent is directed to cease and desist from such conduct. A copy of this Award shall be placed in all files in the Employer's control containing references to the incidents outlined herein.

DATED THIS 1st DAY OF November 1991

  
\_\_\_\_\_  
DOUGLAS C. STANLEY, VICE-CHAIR

  
\_\_\_\_\_  
PATRICK O'KEEFFE, MEMBER

"I Dissent" (dissent attached)

\_\_\_\_\_  
ROBERT REDFORD, MEMBER



DISSENTING OPINION BY R. W. REDFORD  
IN THE MATTER OF FILE T/0063/89  
BETWEEN OPSEU (J. MILLAR)  
AND THE CROWN (MINISTRY OF NATURAL RESOURCES)

Having had the opportunity to review the opinion of the majority in this matter, I find that I must disagree with their premise and their conclusion.

In my submission, the majority have made a fundamental assumption which is in error. The majority have assumed that both the procedure used and the substance of the complaint were bona fide. They appear to have overlooked the possibility that the issue in this case is whether an employee has the unfettered right not to follow a procedure, and to make specious charges, so long as they are in the area of Health & Safety.

The majority are very careful to point out any area where discrepancies occurred in management's statements. The fact for instance, that a prior incident was not investigated thoroughly is highlighted. The suggestion seems to be that management is not only intimidating Mr Millar, but are discriminating by singling him out.

On the other hand discrepancies in the complainant's own testimony or that of his own witnesses are overlooked. Even when

critical details such as the location of the alleged incident were never reported by the complainant because he just could not remember where this heavy blow to the back had occurred, the majority apparently give this no weight, or at least do not interpret the forgetfulness as impinging on the credibility of the grievor's story.

In sum, the majority have simply taken a position that the grievor was being completely forthright, and that the a nasty management group set out to intimidate and harass the fellow.

My own view of the evidence is that management was concerned from the beginning that Mr. Millar was not levelling with them. In spite of that, they did investigate the complaint and they did reach a conclusion that Millar was not telling the truth. Indeed management not only concluded that Millar should have filed a report of the incident, assuming that it occurred, at the time of the incident, but also concluded that Millar appeared to be using the Health and Safety Committee process inappropriately.

It is true, on the one hand that management is required to allow, and encourage the proper use of the Health and Safety Committee. But equally it is the duty of both sides to ensure that the Health and Safety Committee is used only for legitimate concerns

and issues brought forth by employees.

Management did not believe that Mr. Millar was using the Committee in a legitimate manner. Based on Millar's loose story, his failure to recollect the place this traumatic incident had occurred, his failure to report the incident at the time, as required, and the strongly held view of his supervisor, a bargaining unit member that the incident could not have occurred in the terrain where he was working during the period he referenced, plus the reenactment; all go together to paint a picture. The picture is one of misuse of the Health and Safety Committee process.

In the circumstances management acted, not to prevent or dissuade the legitimate use of the committee as a way of addressing real problems. Their actions were totally targeted to deal with what they were convinced was a specious attempt to misuse the Health and Safety process.

When the majority refer to Ken's "cross-examination" of the grievor, they infer an attempt to intimidate the grievor. In fact, Mr. Yaraskavitch's objective was to prove Millar was lying and thereby expose his inappropriate use of the process.

To accept the proposition of the majority would lead me to conclude that inappropriate use of the Health and Safety Committee and/or failure to follow safety procedures are activities that may be protected under 29(2)(c). Therefore management must not proceed to uncover such activity, nor should they initiate activities which could expose the perpetrator.

In my submission therefore, it is obvious that management did not believe Mr Millar's story, that they were concerned about violations to their safety procedure, violations in the use of the Health and Safety Committee, and the misrepresentation in itself.

While their actions in every instance may not have been faultless, their objective was not to prevent or to intimidate any employee, the complainant included, from the legitimate use of the Health & Safety Committee.

On the contrary, their actions were solely aimed at preventing and discouraging inappropriate behaviour, which they believed was gross misrepresentation and the consequent gross misuse of the stated purpose and objectives of their Health and Safety Committee.

Accordingly, without agreeing with every step taken by management in their handling of this behaviour, I would not have found them to have violated any of the alleged sections including 29(2)(c).

A handwritten signature in dark ink, appearing to read 'R. W. Redford', with a stylized, sweeping flourish at the end.

R. W. Redford

October 31, 1991











Ontario Public Service  
Labour  
Relations  
Tribunal

Fonction Publique de l'Ontario  
Tribunal Administratif  
des Relations  
du Travail

T/0067/89-1

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8

416/598 0688

Crown Employees Collective Bargaining Act  
R.S.O. 1980, C. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/0067/89

BETWEEN:

OPSEU (Neely & Stewart)

Applicant

- and -

The Crown In Right Of Ontario  
(Ministry Of Transportation)

Respondent

Before:

J.H. Devlin  
M. Sullivan  
R. Redford

Vice Chairperson  
Member  
Member

For the Applicant:

Howard Law  
Grievance Officer  
Ontario Public Service Employees  
Union

For the Respondent:

David I. Wakely  
Counsel  
Winkler, Fillion & Wakely  
Barristers & Solicitors

Written submissions were received on February 1, April 3 and  
April 18, 1991.

This matter involves an application pursuant to Section 40 of the Crown Employees Collective Bargaining Act to determine whether Linda Neely and Jean Stewart who work as Unit Supervisors in the Ottawa District office of the Administration Section are employees for purposes of the Act.

The position of Unit Supervisor exists in a number of District offices across the Province and there was no dispute that, after being excluded for a number of years, the position was returned to the bargaining unit in 1980. Subsequently, in October of 1987, Ms. Neely and Ms. Stewart filed a grievance in which they claimed that they were improperly classified at Level 10 of the Office Administration Group ("OAG") and requested that they be reclassified at Level 11. When the matter came before the Grievance Settlement Board, the Board concluded that the Ministry was bound by its reply at Stage 2 of the grievance procedure in which the Deputy Minister's designee informed the Grievors that she was recommending an upward reclassification of their position based upon a revised position specification dated February 5, 1988. Following the decision of the Board, in December of 1989, the Ministry advised the Grievors that they would be reclassified from OAG 10 to OAG 11 and excluded from the bargaining unit retroactive to June 1, 1987.

As a result of the Ministry's decision to exclude Ms. Neely and Ms. Stewart from the bargaining unit, an issue arose



between the parties concerning the status of these individuals which was referred to the Tribunal. At the hearing before the Tribunal, the Ministry proceeded with its evidence first and, at the conclusion of the Ministry's case, the Union made a motion for non-suit. Mr. Law, who appeared for the Union, requested that the Tribunal rule on this motion without putting the Union to its election as to whether to call evidence. The Ministry objected to this request and the hearing was then adjourned in order to provide both parties with the opportunity to file written submissions on this procedural matter.

It was the position of Mr. Law that by virtue of Section 38(13) of the Crown Employees Collective Bargaining Act, the Tribunal has the authority to "determine its own practice and procedure". Accordingly, Mr. Law submitted that the Tribunal has the discretion to entertain a motion for non-suit without first putting the moving party to its election as to whether to call evidence. In this case, therefore, the only issue to be determined is whether the Tribunal should exercise its discretion in the manner proposed by the Union.

Mr. Law contended that although issues of cost and fairness have generally been relied upon as the basis for putting a moving party to its election, in fact, these considerations do not dictate such a result. On the contrary, by dispensing with an election and ruling on a motion for non-suit, the cost of

unwarranted or frivolous proceedings may be avoided. Mr. Law also contended that no unfair advantage will accrue to the moving party by adopting this procedure provided that the Tribunal does not comment on the cogency of the evidence and gives no oral or written reasons for its decision in the event that the motion for non-suit is denied. In support of the Union's position, Mr. Law relied upon an award of the Grievance Settlement Board in which the Board determined that in the interests of expedition and fairness, it would entertain a motion for non-suit without putting the Union to its election as to whether to call evidence: see OPSEU (Faler) and the Crown in Right of Ontario (Ministry of Government Services) GSB File No. 218/89.

Mr. Law further submitted that although a practice has developed in civil proceedings of putting a moving party to its election, it is clear that the trial judge retains the discretion to require or to dispense with an election. Where it is alleged that some essential element of the plaintiff's case is lacking, it was contended that argument has been permitted on a motion for non-suit without requiring an election. In such circumstances, the judge is being called upon to determine whether as a matter of law, not of fact, any case has been made out by the plaintiff.

In the instant case, Mr. Law contended that the Ministry has adduced no cogent evidence to demonstrate that there

has been a change in the job duties of Ms. Neely and Ms. Stewart which would warrant their exclusion from the bargaining unit. It was further submitted that if the Tribunal were to rule on the motion for non-suit without putting the Union to its election as to whether to call evidence, the necessity for additional hearing days may be avoided. Mr. Law also pointed out that it has been some time since Ms. Neely and Ms. Stewart were advised of their exclusion from the unit and, in fairness to these individuals, the Tribunal ought to entertain the motion without the requirement for an election. Finally, Mr. Law suggested that the Ministry would not be prejudiced by this procedure provided that the Tribunal does not comment on the cogency of the evidence in the event that the motion for non-suit is dismissed.

It was the submission of Mr. Wakely, on behalf of the Ministry that in civil actions, it is a well established principle and rule of practice that before a motion for non-suit is entertained, the moving party must be put to its election as to whether to call evidence. Mr. Wakely contended that this practice has not been questioned at the appellate level either in Canada or in the United Kingdom and that a party has been permitted to call evidence after a motion for non-suit has been denied only where, through error or inadvertence, that party was not put to its election in the first instance. Alternatively, it was submitted that there must be some compelling reason in the



interests of justice to warrant a party being released from the requirement to make an election.

Mr. Wakely further contended that the practice of putting a moving party to its election is well established in arbitral jurisprudence and is the generally accepted practice before the Ontario Labour Relations Board. Mr. Wakely also pointed out that, until the recent decision in Faler, this practice was generally followed in proceedings before the Grievance Settlement Board.

It was submitted that the primary reason for requiring an election is to ensure procedural fairness and Mr. Wakely contended that both judges and arbitrators have recognized that the trier of fact should not be in the position of having to evaluate or comment on the evidence until all of the evidence has been heard. Although it was suggested in Faler that any concern in this regard can be alleviated by the Board not giving reasons if the motion for non-suit is denied, Mr. Wakely suggested that such an approach is problematic. In particular, it was contended that reasons are an important aspect of the decision making process and the provision of reasons should not depend on the outcome of the ruling. Mr. Wakely further submitted that the procedure proposed by the Union could result in unnecessary delays as the panel would be required to hear argument on the non-suit, consider the evidence and argument, render its decision

and then resume the hearing if the motion were denied. The panel could be also faced with substantially the same argument at the conclusion of the case as was advanced in support of the motion and, in these circumstances, it was submitted that the hearing would be unduly protracted.

Mr. Wakely further contended that, in this case, there are a number of reasons why the procedure proposed by the Union is inappropriate. Firstly, it was submitted that the Ministry proceeded first as a matter of convenience and did not concede that it bears the legal burden of proof. Secondly, it was contended that the Tribunal has recognized that a proceeding under Section 40 is investigative in nature and has indicated that, in the event of a disagreement about the order of proceeding, it will initiate the questioning of the incumbents of the disputed positions: see OPSEU (Silverthorne) and The Crown in Right of Ontario (Ministry of Health), T/0030/87. Although this procedure was not followed in this instance, Mr. Wakely submitted that the Ministry closed its case with the expectation that Ms. Neely and Ms. Stewart would be called to give evidence by the Union. In fact, Mr. Wakely contended that the Tribunal cannot properly discharge its function without hearing evidence from the individuals whose status is in issue. In the result, he asked that the Tribunal follow the generally accepted practice in motions for non-suit and put the Union to its election as to whether to call evidence before ruling on the motion.



The Tribunal accepts that it has the authority to determine its own practice and procedure and, accordingly, has the discretion to entertain a motion for non-suit without putting the moving party to its election as to whether to call evidence. At the same time, the Tribunal recognizes that in civil proceedings in Ontario, it is the general practice to put the moving party to its election and that this is also the usual practice in hearings before the Ontario Labour Relations Board.

Although Mr. Law submitted that an exception to the general practice is warranted where it is alleged that no evidence has been adduced in respect of an essential element of a party's case, it is not clear that this is the nature of the Union's claim in this case. In this regard, the Union contended that the Employer failed to lead any cogent or direct evidence of a change in job duties which would justify the exclusion of Ms. Neely and Ms. Stewart from the bargaining unit. At least in part, therefore, it appears that the motion for non-suit is based upon the sufficiency of the Ministry's evidence and would require the Tribunal to weigh and assess the cogency of that evidence in determining the motion. In such cases, it is generally viewed as appropriate to put the moving party to its election and the Tribunal shares the concerns which have been expressed with regard to the trier of fact being asked to evaluate and comment on the evidence before all of the evidence has been heard. In

our view, this concern is not adequately answered by the suggestion in Faler that no oral or written reasons be provided if the motion is denied and we have serious reservations about rendering a decision, even on an interim basis, for which no reasons could be provided. Moreover, there is much to be said for the proposition that responsibility for the decision to call evidence should rest with the responding party.

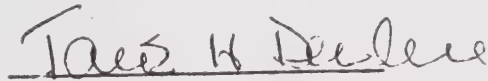
Although it was also suggested in Faler that the potential for prolonging the hearing justified the decision to rule on the motion for non-suit without putting the moving party to its election, in our view, a board can do more than speculate as to whether the procedure adopted will have the effect of expediting rather than protracting the proceedings. To this extent, we are not persuaded that this should be a governing consideration. In any event, we note that this is not a situation as in Faler (and a number of the other cases relied upon by the Union) in which the evidence of the Employer took a considerable number of days. In this case, although there has been some difficulty in scheduling hearing dates which are mutually acceptable to both parties, the Ministry's evidence was completed in two days and there is no reason to believe that if the Union were to call evidence it would take a significantly longer period of time.

However, apart from the general considerations referred to, in the Tribunal's view, there is a more compelling reason for putting the Union to its election in this case. This matter involves an application under Section 40 of the Crown Employees Collective Bargaining Act to determine whether Ms. Neely and Ms. Stewart are employees for purposes of the Act. The Tribunal has recognized the investigative nature of such a proceeding and indicated that, where there is a disagreement about the order of proceeding, it will initiate the questioning of the persons whose status is in issue. Although this procedure was not followed in this case, in our view, a determination under Section 40 should be made after a consideration of all relevant facts and it would be most unfortunate if the Tribunal were asked to render its decision without hearing evidence from Ms. Neely and Ms. Stewart who were not called as witnesses by the Employer.

In the result, having considered the submissions of both parties, the Tribunal reserves on the motion for non-suit and puts the Union to its election as to whether to call evidence. Mr. Law is directed to advise Mr. Wakely within one

week of the next scheduled hearing date whether he intends to call evidence in this matter.

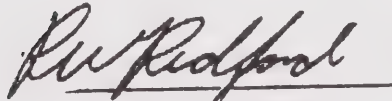
DATED AT TORONTO, this 13th day of May, 1991.



J. Devlin, Vice-Chairperson



M. Sullivan, Member



R. Redford, Member











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T/0067/89-2

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Crown Employees Collective Bargaining Act  
R.S.O. 1980, c. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/0067/89

BETWEEN:

OPSEU (Neely & Stewart)

Applicant

- and -

The Crown in Right of Ontario  
(Ministry of Transportation)

Respondent

Before:

J.H. Devlin	Vice Chairperson
M. Sullivan	Member
R. Redford	Member

For the Applicant:

Howard Law  
Grievance Officer  
Ontario Public Service Employees  
Union

For the Respondent:

David I. Wakely  
Counsel  
Winkler, Fillion & Wakely  
Barristers and Solicitors

Hearing Dates:

April 24, 1990  
December 7, 1990  
June 5, 1991

This matter involves an application pursuant to Section 40(1) of the Crown Employees Collective Bargaining Act to determine whether Linda Neely and Jean Stewart who work as Unit Supervisors in the Ottawa District office of the Administration Section are employees for purposes of the Act.

The events which gave rise to this application are as follows: In the fall of 1987, Ms. Neely and Ms. Stewart filed grievances in which they claimed that they were improperly classified at level 10 of the Office Administration Group ("OAG") and requested reclassification to level 11. When the matter came before the Grievance Settlement Board, the Board determined that the Ministry was bound by its reply at stage 2 of the grievance procedure in which Bev Etmanski, the Manager of Administrative Services for the Eastern Region, indicated that she would recommend the upward reclassification of the Grievors' position based upon a revised position specification dated February 5, 1988. Following the decision of the Board, in December of 1989, the Ministry informed the Grievors that their position would be reclassified from OAG level 10 to OAG level 11 and excluded from the bargaining unit retroactive to June 1, 1987.

As a result of the Ministry's decision to exclude Ms. Neely and Ms. Stewart from the bargaining unit, the Union filed both an unfair labour practice complaint and an application pursuant to Section 40(1) to determine whether Ms. Neely and Ms.

Stewart are employees for purposes of the Crown Employees Collective Bargaining Act. The parties subsequently agreed that the unfair labour practice complaint would be held in abeyance pending the Tribunal's determination of the application under Section 40(1) of the Act.

In respect of this application, it is the position of the Ministry that Ms. Neely and Ms. Stewart are employed in a managerial or confidential capacity and, therefore, are not employees for purposes of the Act. In this regard, the Ministry relies upon Sections 1.(1)(f)(iii) and 1.(1)(1)(iii) and (vii) which are as follows:

1.(1) In this Act,

(f) "employee" means a Crown employee as defined in the Public Service Act but does not include,

(iii) a person employed in a managerial or confidential capacity,

(1) "person employed in a managerial or confidential capacity" means a person who,

(iii) spends a significant portion of his time in the supervision of employees,

(vii) is employed in a confidential capacity in matters relating to employee relations including a person employed in a clerical, stenographic or secretarial position in the Civil Service Commission or in a personnel office in a ministry or agency of the Government of Ontario...



It is the submission of the Union that the incumbents of the Unit Supervisor position in the Ottawa office were included in the bargaining unit for a number of years prior to December of 1989 and there has been no significant change in their job duties which would warrant their exclusion from the unit. In any event, the Union contends that the incumbents are not employed in a managerial or confidential capacity and, therefore, are employees for purposes of the Act.

The evidence indicates that the job of Unit Supervisor is performed in a number of District offices across the Province. Prior to the hearing, all of the positions, with the exception of the position in the Ottawa District office, were classified at OAG level 10 and included in the bargaining unit. During the hearing, however, the Tribunal was advised that the parties recently agreed to reclassify the position in Bancroft from OAG level 10 to OAG level 11. While the Ministry indicated that as a result of this reclassification, the Bancroft position would also be excluded from the bargaining unit, the Union maintained that the matter of exclusion was not raised in any of the discussions which resulted in the agreement to reclassify the Bancroft position.

In the Ottawa office, as in most District offices, the position of Unit Supervisor is filled by two incumbents, one of whom is assigned to the Accounts Payable/Budget Section and the

other, to the Payroll/Personnel Section. From time to time, the incumbents rotate between these assignments and in light of this rotation, it was agreed that the incumbents should be treated in the same manner for purposes of the present application. In each of the two rotations referred to, the Unit Supervisor is responsible for supervising the work of a number of clerical staff.

In the Ottawa office, the incumbents of the Unit Supervisor position report to the District Accountant who, in turn, reports to the Head, District Administration. The Head, District Administration reports to the District Engineer.

The evidence indicates that Ms. Neely assumed the position of Unit Supervisor in the fall of 1985 and until May of 1990 (with the exception of a 6 month period during which she was temporarily upgraded), she was assigned primarily to the Payroll/Personnel Section. Ms. Stewart assumed the position of Unit Supervisor in June of 1987 and until May of 1990, she was assigned primarily to the Accounts Payable/Budget Section. In May of 1990, these assignments were rotated such that Ms. Stewart is now assigned to the Payroll/Personnel Section and Ms. Neely is assigned to the Accounts Payable/Budget Section.

There was no dispute that for a number of years prior to 1980, the position of Unit Supervisor was excluded from the bargaining unit. Following the introduction of the Crown Employees Collective Bargaining Act in 1972, however, the Ministry undertook a review of a number of positions. As a result of that review, the Ministry determined that the Unit Supervisor position did not meet the criteria for exclusion under the Act and beginning in 1980, the position was included in the bargaining unit.

With the introduction of the Office Administration Group series in 1985, the position of Unit Supervisor was classified at OAG level 10 and the position specification which was developed at that time ("the 1985 position specification") provided as follows:

1.	Position Title UNIT SUPERVISOR . . . .			
	Ministry Transportation and Communications		Division Eastern Region	
	Branch and Section District 9 - Ottawa, Administration		Location 530 Tremblay Rd., Ottawa	
	No. of Places	Provides leadership to: No. of positions	No. of Places	Immediate Supervisors' title
	2	2	12	District Accountant

2. Purpose of position (why does this position exist?)

To supervise, control, and be responsible for the efficient operation of either the Accounts Payable/Budget Section or the Payroll/Personnel Section within a complex Financial/Personnel Organization as relating to such items as financial expenditure,



payment of accounts, control and monitoring a computerized Payroll/Personnel system and a computerized expenditure system. Assume the position of the District Account (sic) in his/her absence.

Duties and related tasks (what is employee required to do, how and why? Indicate percentage of time spent on each duty)

1. Under the direction of the District Accountant, and on a rotational basis, is assigned to and assumes the responsibility for the Accounts Payable/Budget or Payroll/Personnel Section.
  - scheduling, delegating and supervising all work within the section to maintain a high level of efficiency to meet established deadlines.
  - recommending merit increases, vacations, assisting in preparing employee performance reports, identifying promotable personnel, authorizing overtime and assisting in the development of a staff training program.
  - resolving minor disciplinary problems such as lateness.
  - serving as a member of the Selection Committee when filling vacancies within the section.
  - recommending changes in accounting, operating procedures and personnel matters to improve efficiency.
  - ensuring that each activity is conducted in accordance with procedures, policies, regulations, and practices.
2. When assigned by the District Accountant to the position of Accounts Payable/Budget or Payroll/Personnel Unit Supervisor, is directly responsible for the work performance of subordinate staff by:

#### ACCOUNTS PAYABLE/BUDGET

- reviewing accounts prepared for payment to ensure they have been processed in accordance with established procedures and policies, i.e. procurement documents, agreements, applicable taxes, eligibility for travelling and/or living expenses, etc.
- contracting suppliers, equipment owners, Municipalities, District Employees and other Ministry Personnel to resolve problems associated with processing of documents for payment ie. invoice discrepancies, ineligible claims, non-receipt of goods, etc.
- ensuring Account Batch Transmittal Listings are prepared in an accurate and proper format to facilitate the issuing of cheques either locally or by means of a treasury requisition.
- ensuring all labour and purchase parts are recorded on garage work orders in accordance with Ministry policy and procedures.
- ensuring the recording of financial transactions at auction sales are received and recorded in accordance with existing policies and procedures, eg. receiving cash and issuing receipts, completing sale dockets, preparing bank deposit, etc.

- responsible for the prompt and accurate recording of all transactions relating to the accountable advance account, including monthly reconciliation.
- responsible for machine signing of cheques issued for locally paid accounts, and requesting of funds from head office.
- scheduling the work flow for input into the O.M.S. expenditure system and in addition generating expense, hired equipment cheques and remittance advices, etc.
- preparing report request and obtaining statistical data and financial reports from O.M.S. system for use by various managers ie. monthly expenditure statements, expenditures by commodity, etc.
- responsible for monthly reconciliation of various stock accounts ie. material, electrical, equipment and sign; patrol stock; returnable containers, etc., using O.M.S. data.
- maintaining record of the status of expenditure between the local O.M.S. data base records and that of the Head Office 270 reconciliation.
- responsible for the preparation of routine and complex recoverable billings arising from various cost-sharing agreements, ie. Connecting Links, Consultants, and also damage to Ministry property, Inter-Ministry charges, etc., using O.M.S. data where applicable.
- responsible for the receipt of and recording of all revenue received in the District Office, eg. Auction Sales proceeds, sign permit fees, encroachment permit fees, etc.
- assisting in the preparation of Annual Estimates and updating when and as required.
- preparing other reports and statements when and as required.
- responsible for the preparation of the Annual Report.
- updating of O.M.S. data base by inserting the following: labour rates, equipment rental rates, funding work orders, patrol, crew, and highway etc.
- ensuring overall efficient operation of O.M.S. equipment ie., backup of data, minor maintenance of printer, etc.
- assisting in resolving of some complex software and some minor hardware problems.
- reviewing daily O.M.S. data to ensure correct input of contracts, projects, etc.
- ensuring that daily transmission of O.M.S. data is complete and balanced accordingly.
- maintaining and storing of all O.M.S. data reports for District and Internal Audit use.
- training employees on the use of O.M.S. Data Equipment ie. data stations and main processor.
- responsible for the issuing, recording and maintaining a supply, of Province of Ontario universal oil company credit cards for District personnel, ensuring proper documentation on hand for lost and/or destroyed cards.



PAYROLL/PERSONNEL

- scheduling work flow to meet established deadlines in the areas of input to O.M.S. system for Maintenance daily work reporting system.
- responsible for the issuing of U.I.C. record of employment forms and notifications to employees regarding the status of their accumulated credits.
- responding to numerous inquiries with regard to attendance credits, proper completion of payroll documents, the composition of individual payroll cheques, rates of pay, employee benefits, working conditions, etc.
- contacting supervisory staff to implement corrective action on discrepancies and/or delinquencies in methods of reporting.
- responsible for preparation of input documents for overtime, shift premiums, and facsimile transmission for payment of unclassified and seasonal wages, etc.
- responsible for processing accident report forms pertinent to Workers' Compensation.
- monitoring reported attendance in relation to shift schedules for such items as shift suspense balances, etc.
- compiling the basic distribution rates for use with the Maintenance Management Costing System.
- modifying and updating position specifications and, if necessary, organization charts.
- maintaining record of District Staff complement.
- Providing a recruitment service by administering Civil Service Commission stenographic and typing tests and arranging for necessary trade tests. Scrutinizing all Applications for employment and making recommendations to applicable supervisor.
- responding to inquiries from the public regarding job opportunities.
- responsible for the proper and prompt preparation of all commencing documents and internal personnel transactions for Classified, Seasonal and Unclassified Staff.
- explaining and discussing terms and conditions of employment with job applicants and new employees.
- examining notification of appointment to the Unclassified and Seasonal Staff, and ensuring the actual periods of appointment are within specified dates of employment and alerting supervisor of the actual termination date.
- in the absence of the Head, District Administration, or when required, providing a counselling service to employees.
- preparing documentation necessary to conduct competitions.
- ensuring Employee Performance Reports are submitted for all staff when and as required.
- advising supervisory staff on items contained with the Collective Agreement.
- answering and preparing routine correspondence pertaining to personnel matters on behalf of the Head, District Administration.

- maintaining good liaison with local representative of Canada Manpower and officials of academic institutes together with Regional and Head Office Payroll/Personnel staff members.
- preparing other reports and statements when and as required.
- reviewing, checking and mailing or distribute all classified and unclassified pay cheques.
- reviewing for correctness, Canada Savings Bond applications/auxiliary related duties as assigned.

5% 3. Other duties as assigned.

4. Skills and knowledge required to perform job at full working level. (Indicate mandatory credentials or licenses, if applicable)

Related clerical experience in all phases of accounting and personnel within each unit. Willingness to accept responsibility for decision making relating to work problems. Ability to communicate clearly, both orally and in writing and supervising the work of subordinates. Experience in the preparation of financial statistical reports. Proven supervisory ability, knowledge of computers and processor, working knowledge of collective agreement, Financial Planning and Administration Manual, Expense Account Manual; Manual of Administration.

#### IMPACT OF ERRORS

Errors in processing accounts could result in duplicate payments, improper recording of expenditures. Failure to meet discount deadlines would cause financial penalties. Errors in payroll procedures could cause delayed and/or overpayment in salaries. Personnel errors could cause public embarrassment and/or inconvenience to staff.

. . .

As indicated previously, in the fall of 1987, Ms. Neely and Ms. Stewart filed grievances claiming that they were improperly classified and in December of 1987, they met with Ms. Etmanski, the Deputy Minister's designee at stage 2. Although it is not entirely clear, it would appear that Bill Foote, the District Accountant and John Kenny, a Human Resources Officer assigned to the Eastern Region, were also present at this meeting. In any event, Ms. Etmanski testified that during the meeting, Ms. Neely and Ms. Stewart made a number of

representations in support of their claim for reclassification. According to Ms. Etmanski, the thrust of these representations was that certain personnel and confidential functions performed by the incumbents were not accurately described in the 1985 position specification. Ms. Etmanski testified that these functions generally pertained to counselling, involvement in staffing and the responsibility for both grievance and personnel files.

As a result of the representations made by Ms. Neely and Ms. Stewart, agreement was reached to develop a new position specification and Ms. Etmanski testified that it was her goal to expand the description of the personnel and confidential functions performed by the incumbents. The revised specification ("the 1988 position specification"), which was prepared by Mr. Kenny in consultation with management in the Ottawa District office and input from Ms. Neely and Ms. Stewart, was as follows:

1.	Position Title UNIT SUPERVISOR . . .		
	Ministry Transportation	Division Eastern Region	
	Branch and Section district #9 - Administration Section	Location 530 Tremblay Rd., Ottawa	
No. of Places	Provides group leadership to: No. of positions      No. of Places		Immediate Supervisors' title
2	2	12	District Accountant

Purpose of position (why does this position exist?)



To supervise, control, and be responsible for the efficient operation of either the Accounts Payable/Budget Section or the Payroll/Personnel Section within a Financial/Personnel Organization. Duties include such items as financial transactions, control and monitoring a computerized payroll and expenditure system, and providing a District Personnel service. Assumes the position of District Accountant in his/her absence.

3. Duties and related tasks (what is employee required to do, how and why? Indicate percentage of time spent on each duty)
1. Under the direction of the District Accountant, and on a rotational basis, is assigned to and assumes responsibility for the Accounts Payable/Budget or Payroll/Personnel Section by:

ACCOUNTS PAYABLE/BUDGET

70%

- ensuring the accuracy and eligibility of a variety of payables and services (ie. invoices, expense accounts, hired equipment), as per defined policies, resolving discrepancies, and discussing with supervisor those matters which conflict with those policies (approx. 14,500 transactions, 18 million expenditure)
- scheduling the work flow for input into the OMS expenditure system and in addition generating expense and hired equipment cheques, remittance advices, etc.
- supervising and updating of OMS database by inserting labour rates, equipment rental rates, funding work orders, patrols, crews, highways, etc.
- reviewing daily OMS data to ensure correct input of contracts, projects, etc.
- ensuring accurate and timely processing of OMS related functions (ie., daily transmission of data storing data reports.
- ensuring accuracy of database information to provide management with comprehensive reports, statistical data and budgetary controls
- reconciling the District expenditure base with that of Head Office 270;
- training employees on the use of OMS data equipment (ie. terminals and main processor)
- ensuring various stock accounts (ie. material, electrical, equipment, sign, patrol, returnable containers) are reconciled monthly using OMS data
- ensuring overall efficient operation of OMS equipment (ie. backup of data; minor maintenance of printer) and assisting in resolving complex software and some minor hardware problems
- responsible for all computerized production and stock related costing and controls for Regional Sign Production (1,265 production orders in 1986)
- controlling the endorsement of locally issued cheques and requesting monies from Head Office for the disbursement and accountable advance accounts

- ensuring Account Batch Transmittal Listings are prepared in an accurate and proper format to facilitate the issuing of cheques, either locally paid or by means of a treasury requisition
- responsible for the receipt, recording and security of monies received in District Office (ie. 1987 Auction Proceeds - \$225,000; 1987 Weekly Cash - \$55,000; 1987 Bonding \$1 million) and related forms (ie. Official Receipts, Sale Dockets, Deposits, Bonding Letters)
- responsible for issuance and receipt of accountable advances and monthly reconciliations
- ensuring all costings are recorded by computer and manual process to provide accuracy for all costing associated with the operation of the District Garage
- contacting suppliers, equipment owners, municipalities, District Employees and other Ministry Personnel to resolve problems associated with processing of documents for payment (ie. invoice discrepancies, ineligible claims, non-receipt of goods etc.);

#### PAYROLL/PERSONNEL

- ensuring the receipt of employee attendance documents and the accurate application of all regulations pertaining to time worked and time off
- scheduling input and submission of payroll documents to meet rigid deadlines (ie. M.D.W.R., premium payments, central attendance reports, unclassified pay system)
- preparing detailed input to update C.A.R.S. and verifying accuracy of output in accordance with policy
- contacting supervisory staff to implement corrective action on discrepancies and/or delinquencies in methods of reporting Payroll/Personnel data to District Office
- compiling distribution rates for use with the Maintenance Management Costing System necessitated by salary revisions
- ensuring applicable policies of Canada Manpower and Worker's Compensation are adhered to, through issuance of all pertinent documentation
- verifying the accuracy of payroll cheques and paylists vs. source documents
- ensuring classified and unclassified salary cheques are checked and mailed or distributed properly
- issuing, recording and maintaining a supply of Province of Ontario Universal Oil Company Credit Cards for district Personnel, ensuring proper documentation on hand for lost and/or destroyed cards
- reviewing Canada Savings Bond applications and distributing bonds accordingly
- ensuring accuracy and confidentiality of personnel files relative to employment records, (ie. E.S.R. cards, insurance declaration, P.P.R.'s letter of reprimand etc.) (approximate 350 files)
- initiating employment process by completion of staffing requisitions



- as required, participates on Selection Committees by assisting in the preparation of job competition advertisements and interview questions, attends interviews and completes related documents and letters for signature
- maintaining an application for employment file, researching and identifying qualified applicants as requested
- responding to public enquiries regarding job opportunities, qualifications, staffing process, etc.
- administering various skill tests in shorthand and typing
- explaining and discussing benefits, terms and conditions of employment with job applicants, new and current employees; preparing various related documents
- responding to numerous enquiries from staff and the public (ie. benefits, conditions of employment, attendance credits, and employment verification)
- in co-ordination with the Head District Administration, frequently provides counselling service to employees regarding pension qualification, calculation and benefit status (annual recruitment 33, annual retirement 26, Classified staff 246, Seasonal 130 (approx.), Unclassified 30 (approx.), annual payroll 9 million)
- advising managers regarding Ministry interpretation and application of regulations dictated by policies (ie. collective agreement, Public Service Act, etc.) as it pertains to classified, seasonal and unclassified staff
- examining notification of appointment to the Unclassified and Seasonal Staff, ensuring the actual periods of appointment are within specified dates of employment and alerting supervisor of the actual termination date
- occasionally serving as a resource person at a disciplinary hearing
- ensuring Employee Performance Reports are submitted for all District Staff when and as required
- maintaining good liaison with local representatives of Canada Manpower and officials of academic institutions together with Regional and Head Office Payroll/Personnel staff members
- preparing routine correspondence in response to personnel matters, on behalf of Head, District Administration.
- maintaining accurate training, position specification and organization chart files and records of District Staff Complement;

2. Performs various administrative/supervisory duties such as:

- scheduling, delegating and supervising all work within the section to maintain a high level of efficiency and to meet established deadlines
- responsible for direct supervision of financial recording and reporting services for a large geographical District with a total expenditure of \$18 million annually

- recommending to supervisor, changes in accounting operating procedures, policies, regulations and practices.
- resolving disciplinary problems within section (ie. punctuality, attendance, performance, attitude) referring continuing, unusual or complex situations to supervisor and making recommendation
- recommending merit increases, overtime and vacations; developing for supervisor's approval employee performance reports; identifying promotable personnel; assisting in the development of a staff training program;
- training and developing employees in all aspects of the work unit (ie. rotating, computerized equipment, Ministry and Government regulations) to ensure organizational knowledge and strength;
- contact with supervisor, Regional and Head Office specialists to seek advice, exchange information and resolve problems;
- assisting in the development and security of various programs associated with the District Micro Computer;
- as required, serving as a member on Selection Committees for the recruitment of clerical staff;
- participating in Tender Openings, as required;

3. Miscellaneous duties as assigned.

4. Skills and knowledge required to perform job at full working level. (Indicate mandatory credentials or licenses, if applicable)

Thorough knowledge of the related programs, procedures, acts and legislation and their application to ensure a high level of efficiency within own work unit and other related branches and agencies (eg. U.I.C., W.C.B., H.O. and Regional Personnel, District Maintenance and Municipal Branches).

Thorough knowledge of OMS computer systems to provide a comprehensive costing/budget service. Thorough knowledge of all Accounts, Budget, Payroll and Personnel procedures as this position is rotational and has only 2 incumbents. Ability to thoroughly understand Ministry regulations, policies and procedures. Knowledge of the various programs and activities within a District to ensure that administrative requirements are adhered to. Well developed communication skills and supervisory skills to ensure that a high level of expertise and efficiency exists within a work unit. Application of mathematical calculations in an accounting and personnel environment. Problem analysis and decision making ability is required to determine where problems exist and what corrective action should be taken (as it relates to the organization of the work and the methods of achieving established objectives).

. . . .

JUDGEMENT: Incumbents must fully understand the objectives of the work unit, recognizing and analyzing the problems and issues. They exercise judgment by assisting supervisors, staff and public in resolving problems where no clear guidelines or precedence exists



(ie. Seasonal Staff issues, ensuring proper licenses and insurance requirements have been met by HIred Equipment owners). Situations in direct conflict with policy are discussed with Supervisor. Incumbents exercise judgment where recommending to supervisor, changes to policies, practices, regulations and procedures.

ACCOUNTABILITY: Incumbents are responsible for application of Ministry interpretation of policy (ie. Directives, memos, manuals and Collective Agreement) when resolving problems and advising on staffing problems and job status. Accountable for ensuring proper signing authorities exist for all transactions. Responsible for decisions, recommendations and analysis of unit as it relates to work production and in advising other work units of required time frames and issues that interface with own area of responsibility. Incumbent is accountable to reach and maintain the objectives of their work unit, referring matters that deviate from policies or practices to their supervisor. Confidentiality of all Financial and Personnel matters.

IMPACT OF ERRORS:

Accounts Payable/Budget: Improper or inadequate financial data could seriously reflect on accuracy of statistics, financial estimates, over-expenditures and future planning. Improper processing of invoices would cause inconvenience to outside agencies and financial loss to Ministry (ie. duplicate payment).

Payroll/Personnel: Incorrect information on UIC or WCB forms could result in undue hardship to the employee and cause Ministry embarrassment. Improper payments to staff or counselling of employee benefits, wages, life insurance, medical coverage and death benefits could result in significant expenditure in time and resources to correct, loss of Government monies, hardship to employees.

WORKING ENVIRONMENT:

Office atmosphere with volume, pressure and a wide variety of duties.

In early 1988, following the development of the revised specification, Ms. Etmanski met again with Ms. Neely and Ms. Stewart. At the time of this meeting, Ms. Etmanski had in her possession a preliminary evaluation of the Unit Supervisor position which had been prepared by Mr. Kenny based upon the 1988 position specification. According to Ms. Etmanski, this

evaluation indicated that if the Unit Supervisor were to continue to perform duties which she described as involving personnel and confidential functions, then the position warranted both upward reclassification and exclusion from the bargaining unit.

When Ms. Etmanski met with Ms. Neely and Ms. Stewart in early 1988, she indicated that she would recommend the upward reclassification of their position but she did not advise them that this would also entail their exclusion from the bargaining unit. Ms. Etmanski testified that, in retrospect, she ought to have taken the matter under advisement or, alternatively, made it clear that her recommendation was based upon the continued performance of personnel and confidential functions which, in the Ministry's view, justified the exclusion of the position from the bargaining unit.

Following the meeting with Ms. Neely and Ms. Stewart, the Ministry undertook a review of the Unit Supervisor position in other District offices across the Province. According to John Sharp, a Human Resources Officer for the Eastern Region, this review revealed that the personnel and confidential functions which warranted the upward reclassification of the Unit Supervisor position in Ottawa were not being performed in the other offices. As a result, in December of 1988, the Ministry made a decision to maintain the position of Unit Supervisor in the Ottawa office at OAG level 10. The Ministry then advised Ms.

Stewart, who was assigned to the Accounts Payable/Budget Section that her grievance was denied. Ms. Neely, who was then assigned to the Payroll/Personnel Section, was informed that certain of the duties which she had performed were more closely associated with duties normally assigned to more senior personnel. For this reason, she was upgraded to OAG 11 for the period from June 1, 1987 to December 31, 1988. She was advised, however, that effective January 1, 1989, she would revert to her existing classification which was OAG level 10 and, thereafter, those functions involving "the more in depth counselling, policy interpretations, attendance at interviews, etc." would be performed by members of management.

In fact, in December of 1988, Jim Moore, the Head, District Administration, issued the following memorandum indicating that certain duties, or types of service, were to be deleted from the Unit Supervisor position specification:

TYPE OF SERVICE	PROVIDED BY
<ul style="list-style-type: none"> <li>- Provide counselling service to all employees regarding pension qualification, calculation and benefit status</li> </ul>	Head District Administration or in his absence, District Accountant. The Payroll Personnel Unit Supvr. occasionally assists in providing the pension calculations.
<ul style="list-style-type: none"> <li>- Advising Managers regarding Ministry interpretation and application of regulations dictated by policies, i.e. Collective Agreement, Public Service Act.</li> </ul>	Head District Administration District Accountant



\* Once an interpretation on a particular issue has been rendered the Payroll/Personnel Supervisor then responds to requests received from Supervisors.

- |   |   |
|---|---|
| - Ensuring accuracy and confidentiality of personnel files relative to employment records   | Head, District Admin. is responsible.<br>Payroll/Personnel Unit Supervisor is the custodian of the files  |
| - Participating on Selection Committees by assisting in the preparation of job competition advertisement and interview questions, attending interviews and completing related documents and letters for signature | Head Admin. or District Accountant attends interview and assists in preparation of questions. Payroll/Personnel Unit Supr. may assist in development of job advertisement, completes relevant documents for successful candidate and letters for signature. |
| - Occasionally serving as a resource person at a disciplinary hearing   | Head District Admin. or District Accountant serves as the resource person at disciplinary hearings  |
| - Explaining and discussing benefits, terms and conditions of employment with job applicants, new and current employees   | Head District Admin. or in his absence District Accountant  |
| - Employee Performance Reports (own staff)  | Unit Supervisor provides input  |

The evidence indicates, however, that despite the memorandum from Mr. Moore, the incumbents of the Unit Supervisor position continued to perform the duties set out above. According to Ms. Stewart, Mr. Moore indicated that there was simply no one else available to perform these duties.

As indicated previously, in late 1989, the Grievance Settlement Board released its decision directing the upward reclassification of the Unit Supervisor position in the Ottawa District office. In implementing the decision on behalf of management, Mr. Sharp testified that he compared the 1985 and 1988 position specifications and found a number of differences which were significant. Although Mr. Sharp initially suggested that the 1988 specification contemplates greater involvement in the selection of staff and, in particular, refers to participation on selection committees, he subsequently acknowledged that a similar provision also appears in the 1985 specification.

According to Mr. Sharp, however, there are a number of other areas in which the 1988 specification reflects greater scope for independent decision-making than appeared in the 1985 specification. In this regard, Mr. Sharp noted that the 1988 specification refers to the Unit Supervisor explaining and discussing benefits and terms and conditions of employment whereas the 1985 specification refers only to explaining and discussing terms and conditions of employment. Mr. Sharp also testified that the 1988 specification contemplates greater involvement in counselling and provides that, in co-ordination with the Head, District Administration, the Unit Supervisor frequently provides a counselling service to employees regarding pension qualification, calculation and benefit status. The 1985

specification, on the other hand, provides that, in the absence of the Head, District Administration, or when required, the Unit Supervisor shall provide a counselling service for employees. Mr. Sharp also noted that the 1988 specification refers to the Unit Supervisor advising managers regarding Ministry interpretation of the Collective Agreement and he expressed the view that this is a more responsible function than advising supervisory staff of items contained in the Collective Agreement which is found in the 1985 position specification. Finally, Mr. Sharp noted that the 1988 specification refers to the Unit Supervisor occasionally serving as a resource person at a disciplinary hearing and he testified that there is no comparable responsibility contained in the 1985 position specification.

Mr. Sharp also testified that, in the course of implementing the decision of the Grievance Settlement Board, he reviewed an evaluation of the Unit Supervisor position prepared by Mr. Kenny following the development of 1988 position specification. This evaluation provided for an increase in the points assigned to the factors of judgement and accountability and Mr. Sharp testified that this was intended to reflect greater scope for independent decision-making in the area of personnel and confidential functions.

Finally, Mr. Sharp testified that he reviewed and



revised an exclusion report which was also prepared by Mr. Kenny in 1988. The revised report contains the following:

. . .

Consider the following supervisory functions and specify the position's actual responsibilities in each applicable area:

1. Selection of Staff:

- member of the Selection Panel
- reviews applications and recommends selection of contract staff to supervisor as required.

2. Dismissal:

- provides information which may result in dismissal.

3. Other Disciplinary Action:

- discuss unacceptable performance with subordinates
- issues verbal reprimands as feels is necessary
- recommends disciplinary actions such as written reprimands, suspensions
- recommends denial of merit increases
- recommends reassignment of duties to remove employee from area of non or unacceptable performance.

4. Scheduling of Work Activities:

- assigns duties by priority
- schedules and delegating work to meet established deadlines
- recommendation for vacation, time off
- ensures Collective Agreement and Benefit agreement is followed according to regulations
- ensures established financial policies and procedures are being applied
- ensures personnel procedures are followed when hiring, promoting, demoting, terminating employees
- counselling employees on retirement
- advising Managers regarding Ministry interpretation and application of regulations

5. Assignment of Duties to Employees, including transfer of employees to other positions:

- assigns duties to each employee including recommendation for transfer to other positions for training purposes to ensure all employees are qualified in all areas of work
- reassigning staff due to medical problems such as removing pregnant staff from exposure to VDT's

6. Evaluate subordinate work performance and reports on evaluation for
  - Promotions
  - Demotions
  - Merit Increases
  - Appointment to Regular Staff
- makes recommendations to supervisor for appointment, promotion and merit increases
- completes Employee Performance Reports
- documents and gives evidence relative to disciplining and possible dismissal of staff
7. Train and directs staff in performance of work activities.
  - responsible for the training of staff and interpretation of policies and regulations
  - recommends courses for further training and development of staff
  - monitors progress and effectiveness of training, revises training plans as deemed required.
8. Assessing and replying to subordinate's grievances:
9. Approves overtime, grants time off, schedules vacation:
  - assessing and recommending vacation and overtime for subordinate staff.
10. Plans, organizes and controls work methods and procedures:
  - makes recommendation to improve existing system, develops new procedures, and implements revisions
  - position is responsible for the effective provision of clerical services in personnel/payroll, accounts payable/budget functions, to ensure proper financial control, accurate forecasting, personnel and payroll policies are followed.
  - deals with problems arising from the application of policies and procedures, initiating action on own initiative or other consultation with Supervisor other authorities in the particular field.
11. Any other significant function, not specified above.
  - frequently in contact with District and Regional Personnel to clarify Personnel, Accounting and Financial matters. Occasionally in contact with Management to obtain and provide guidance regarding financial matters.



- regular contact with representatives of outside sources both oral and written, to discuss problems in accounts submitted for payment
- answering various internal/external questions relative to benefits, pensions, W.C.B., payroll, LTD, employment, insurance and accumulated credits.
- prepares competitions for posting according to classification specifications and procedures
- serves as a resource person at a disciplinary hearing

. . . .

(g) Explain in detail in what way is the incumbent involved with employee relation matters:

- under the direction of the District Accountant is assigned to and assumes responsibility for the Payroll/Personnel Section
- position has full access to all personnel files, interview questions, competition files, grievance files, classification records, reprimands, hearings and salaries
- advises various levels of staff on personnel and payroll matters according to Collective Agreement and Manual of Administration. Prepares all recruitment documents
- is required to have a working knowledge of the 4 units (Personnel, Payroll, Accounts Payable, Budget) along with a general knowledge of computers and their programs for conversing with Regional and Head Office personnel.

. . . .

The conclusion reached in both the initial and revised reports is that Ms. Neely and Ms. Stewart are properly excluded from their bargaining unit on the basis that (1) they spend a significant portion of their time in the supervision of employees and (2) they are employed in a confidential capacity in matters relating to employee relations.

The only direct evidence as to the duties actually performed by the incumbents of the Unit Supervisor position in the Ottawa office was provided by Ms. Neely and Ms. Stewart. As

indicated previously, Ms. Neely was appointed to the position in the fall of 1985 and Ms. Stewart assumed the position in June of 1987. Together, they are responsible for supervising 12 clerical staff, 7 of whom are assigned to the Accounts Payable/Budget Section and 4, to the Payroll/Personnel Section, with one clerk being shared between the two Sections. The clerical staff is now comprised entirely of Financial Services Clerks who are classified at OAG level 8. The evidence indicates that in the Accounts Payable/Budget Section, between 70 and 75% of the Unit Supervisor's time is devoted to supervising the work of the clerical staff whereas in the Payroll/Personnel section, supervision accounts for only 25 to 30% of the Unit Supervisor's time.

With respect to merit increases, the evidence indicates that the Unit Supervisor prepares preliminary performance appraisals of clerical staff and then discusses and reviews these appraisals with the District Accountant. Ms. Stewart testified that the District Accountant makes some change to approximately one-half of the appraisals she prepares and that, in some cases, the change is substantial.

In respect of disciplinary matters, Ms. Neely has counselled or verbally warned employees and recorded her discussions in writing although she testified that the records did not form part of the employees' personnel files. Ms. Stewart

has also discussed lateness with one employee and recorded the discussion in writing but, again, this did not form part of the employee's personnel file and was not viewed by Ms. Stewart as disciplinary. Ms. Stewart also testified that if she noted a deterioration in the performance of a member of the clerical staff, she would discuss the matter with the District Accountant and she assumed that he would speak with the employee directly.

The evidence indicates that the incumbents of the Unit Supervisor position also have some involvement in the selection of staff. In particular, the incumbent assigned to the Payroll/Personnel Section may be required to maintain competition files, to contact applicants for interviews and to prepare correspondence for signature by the chairman of the selection committee to notify applicants of the outcome of the competition. In addition, in some cases, both Ms. Neely and Ms. Stewart have been involved in screening applicants according to pre-determined criteria. They have also served as members of selection committees and, in this regard, Ms. Stewart served on 2 or 3 selection committees while assigned to the Accounts Payable/Budget Section and has served on one committee since being assigned to the Payroll/Personnel Section. Ms. Neely has served as a member of 4 or 5 selection committees since assuming the position of Unit Supervisor in 1985.



In each case, the selection committee has been comprised of three individuals and neither Ms. Neely nor Ms. Stewart has ever chaired a committee, nor drafted the questions to be asked of the candidates. Each, however, has evaluated candidates by assigning points to the answers given at an oral interview. For the most part, it would appear that Ms. Neely and Ms. Stewart have been involved in competitions to fill entry level positions and they testified that at the conclusion of the interviews, there has never been any doubt as to which candidate ought to be awarded the position. As a result, neither Ms. Neely nor Ms. Stewart has ever been involved in any discussion concerning the relative equality of job applicants. Ms. Neely suggested that if the scores of two applicants were close, the chairman of the selection committee would make a recommendation to the District Engineer who would then make the final decision.

Apart from the duties outlined, the Unit Supervisor assigned to the Payroll/Personnel Section also performs certain duties which the Ministry relies on to justify the exclusion of the position from the bargaining unit. In particular, the incumbent assigned to the Payroll/Personnel Section is responsible for the accuracy and confidentiality of personnel files. Ms. Stewart testified that these files are generally locked but that she has access to the files on a daily basis to file or retrieve documentation requested by an employee or by a member of management. Included in these files is documentation

such as employee performance appraisals, reprimands, medical certificates and information relating to pension and benefit entitlement. Ms. Stewart testified that she has never come across an internal memorandum from management when filing or retrieving documentation from the personnel files.

Until January of 1991, the Unit Supervisor assigned to the Payroll/Personnel Section was also responsible for the security of the grievance files. Since January, however, these files have been in the possession of Brenda Oden, who replaced Mr. Moore as the Head, District Administration. Ms. Stewart testified that prior to January of 1991, she filed and retrieved documentation from the grievance files which contained grievance forms and replies at various stages of the grievance procedure. Although some of the files also contained minutes of grievance meetings taken by members of management, Ms. Stewart testified that she had no reason to peruse this material. Ms. Neely also testified that when she was assigned to the Payroll/Personnel Section, she never came across any memorandum from management addressing the merits of a particular grievance.

The Unit Supervisor assigned to the Payroll/Personnel Section is also involved in explaining and answering questions with respect to salary, vacation and benefit entitlement. Ms. Stewart testified that, for this purpose, she consults the Collective Agreement and the Manual of Administration which sets



out the Ministry's policy on compensation and benefits under the Agreement. In answering questions of members of management, the Unit Supervisor is provided with a book outlining the details of the Management Compensation Plan. In the event that this documentation does not provide the answer to a particular question, the Unit Supervisor consults the Human Resources Officer assigned to the District.

In co-ordination with the Head, District Administration, the Unit Supervisor assigned to the Payroll/Personnel Section also provides counselling regarding pension qualification and, in this regard, Ms. Stewart testified that she answers questions concerning pension entitlement. She may also obtain a pension estimate from the Human Resources Officer assigned to the District. Both Ms. Neely and Ms. Stewart testified, however, that they do not deal with human rights issues such as allegations of discrimination, nor with issues relating to employment equity.

Finally, as provided in the 1988 position specification provides, the Unit Supervisor assigned to the Payroll/Personnel Section may occasionally serve as a resource person at a disciplinary hearing. Although Ms. Stewart has not performed this function, Ms. Neely testified that, on one occasion, she was asked to attend a disciplinary interview in the absence of Mr. Foote, the District Accountant. Ms. Neely testified that her

involvement consisted of taking notes in order that the Maintenance Engineer would have an accurate record of the interview.

With respect to the meeting with Ms. Etmanski in December of 1987, Ms. Stewart testified that she and Ms. Neely did not take the position that there had been a significant change in their job duties but rather that their existing duties were not accurately described in the 1985 position specification. Ms. Stewart testified that they also pointed out that at one time, there had been one Unit Supervisor assigned for each of 4 Sections, namely, Budget, Accounts Payable, Personnel and Payroll. At the time of the meeting, however, and, in fact, at least since 1985, there had been only two incumbents in the position and Ms. Neely and Ms. Stewart expressed the view that this had resulted in an increase in responsibility. They also noted that because there were only two incumbents, each was required to supervise a larger number of clerical staff.

The issue then is whether Ms. Neely and Ms. Stewart are employees for purposes of the Crown Employees Collective Bargaining Act. Before considering the duties performed by these individuals, it is necessary to address certain submissions advanced by the Ministry with respect to the application of the doctrine of estoppel. In this regard, it was the initial submission of the Ministry that as a result of the decision of

the Grievance Settlement Board (which was based upon the Ministry's reply at stage 2 rather than a review of the duties performed by the Grievors), the position of Unit Supervisor in the Ottawa District office was reclassified from OAG level 10 to OAG level 11. The Ministry contended that, in fact, the duties which warranted the upward reclassification of the position also justified its exclusion from the bargaining unit. Accordingly, as the incumbents have now obtained the benefit of the OAG level 11 rate, the Ministry submitted that the Union ought to be estopped from objecting to their exclusion from the bargaining unit.

The submission of the Ministry, we find, cannot prevail. While the Ministry was evidently of the view that the duties which warranted upward reclassification also warranted exclusion from the bargaining unit, there was nothing to suggest that the Union acquiesced in this view. In fact, the evidence indicates that the Ministry's position was not communicated to the Union or to the incumbents. Although Ms. Etmanski informed Ms. Neely and Ms. Stewart that she would recommend the upward reclassification of their position, she did not indicate that this would also result in their exclusion from the unit. Accordingly, in the absence of any evidence that there was some understanding or agreement on the part of the Union that the upward reclassification of the Unit Supervisor position would also result in its exclusion, the Tribunal finds that there is no



basis for the application of the doctrine of estoppel. In these circumstances, the Tribunal is left only with the Ministry's view that exclusion was warranted and this view, or the view of any party, for that matter, is not determinative of an application of this sort.

In contrast to the position of the Ministry, it was the initial position of the Union that the Tribunal must find Ms. Neely and Ms. Stewart to be employees for purposes of the Act because the Ministry previously agreed to the inclusion of the Unit Supervisor position in the bargaining unit and failed to adduce any evidence of a change in job duties which would justify its exclusion. As to the significance of the prior inclusion of the position in the bargaining unit, the Union referred to OPSEU (Silverthorne) and The Crown in Right of Ontario (Ministry of Health) T/0030/87 in which the Tribunal commented as follows:

And it is in that connection that the second question arises in this case, in terms of the effect of evidence that a position now in dispute had been either included in or excluded from the bargaining unit over a substantial period of time, without any apparent problem. In that regard the respondent notes that the Tribunal in T/10/76, issued December 23, 1977, observed at page 6

Second there is the hard fact that Mr. Williams has been a member of the bargaining unit for some time without any previous impairment of his functions. In previous test cases before the Tribunal we have scrupulously avoided any discussion or consideration as to whether persons before us under Section 38 were or were not members of the bargaining unit, preferring to view such applications as fresh and without any relationship to the past practice of the parties.

As the applicant notes, however, the Ontario Labour Relations Board, in the Corporation of the City of Thunder Bay, for example, [1981] OLRB Rep. August 1121, has had this to say, at para. 7:

- (2) a party who is attempting to alter a status quo which reflected the earlier perceptions of the parties concerning an individual's status, and which has apparently worked adequately for some years must recognize the importance of this historical dimension, and be prepared to adduce clear evidence as to why a change is required to accommodate the interests section 1(3)(b) was designed to protect.

Those comments by the Board, it seems to us, do no more than attempt to reflect what the Board saw as the reality of that type of situation, in terms of what impact a lengthy history of acceptance of one status or the other of a person or position is likely to have upon the adjudicator - in the absence of compelling evidence leading the adjudicator to a conclusion that is to the contrary. We agree with that practical assessment by the Ontario Labour Relations Board and, consider that it would be a useful guide to the public-service community to re-iterate it here. We note, in fact, that the Tribunal in T/10/76 itself went on from the statement referred to us by the respondent to add:

However in this case, bargaining unit involvement has been stressed as going to the root of Mr. Williams' capacity to perform the services required of him and since he has been a member of the bargaining unit there is no need for us to speculate about that central fact. Mr. Williams testified that there has been no suggestion that being represented by a union impairs his function, although he does not advertise his involvement. He indicated that no one has refused to discuss matters with him because he belonged to the union although he might be less effective if it were known that he were represented. In truth the evidence indicates that Mr. Williams has not been handicapped in performing his duties as a result of his membership in the bargaining unit although there is a suggestion that he has been discreet about publicizing his involvement. Since there has been no impairment of his function, in these circumstances we are reluctant to exercise our discretion so as to disturb the status quo.

. . . .



As is made clear in Silverthorne, the historical dimension is an important one. In this case, the position of Unit Supervisor in the Ottawa District office was included in the bargaining unit for some nine years prior its exclusion in December of 1989. In these circumstances, there is a clear onus on the party seeking to alter the status quo to demonstrate the need for such a change.

As indicated previously, the Ministry submits that the incumbents of the Unit Supervisor position are properly excluded from the bargaining unit as they are employed in a managerial or confidential capacity within the meaning in the Act. In particular, the Ministry contends that the incumbents spend a significant portion of their time in the supervision of employees and are also employed in a confidential capacity in matters relating to employee relations.

Dealing firstly with the matter of supervision, the evidence indicates that whereas the Unit Supervisor assigned to the Payroll/Personnel Section spends approximately 25 to 30% of her time supervising clerical staff, the incumbent assigned to the Accounts Payable/Budget Section devotes 70 to 75% of her time supervising the work of the clerical staff. Co-ordinating or overseeing the technical work of employees, however, is not in itself indicative of managerial authority and, instead, it is necessary to determine whether the incumbents exercise any degree

of effective control over the employment relationship. In other words, do the incumbents have the authority to make effective recommendations with respect to the terms and conditions of employment of the clerical staff whom they supervise?

In this regard, the evidence indicates that the incumbents have served on selection committees although they have not been involved in formulating the questions asked of the applicants, nor has either of them ever chaired such a committee. With respect to the matter of merit increases, it appears that the incumbents prepare only preliminary performance appraisals of clerical staff and given the extent to which changes are made to these appraisals by the District Accountant, it cannot be said that the incumbents make effective recommendations in this area. Insofar as discipline is concerned, Ms. Neely and Ms. Stewart have done no more than counsel or verbally warn employees. In fact, Ms. Stewart testified that in the event of unsatisfactory performance on the part of a member of the clerical staff, she would discuss the matter with the District Accountant and she assumed that he would deal with the employee. The Ministry offered no evidence from any member of management with direct knowledge of the position to contradict the testimony of Ms. Stewart or to suggest that the incumbents actually exercise greater responsibility with respect to the imposition of discipline than their evidence would indicate. Accordingly, while the position specification suggests that the incumbents

recommend disciplinary action beyond verbal warnings, there is no basis for concluding that they make effective recommendations in this regard.

In the result, it appears that the only area in which the incumbents of the Unit Supervisor position exercise any degree of control over the employment relationship is in the selection of staff. As indicated previously, however, neither of the incumbents has ever chaired a selection committee. In any event, given the absence of effective control in any other area and the lengthy period during which the Unit Supervisor position was included in the bargaining unit with no apparent impairment of function, the Tribunal finds that the incumbents' involvement in the selection of staff is not sufficient to warrant their exclusion from the bargaining unit.

We turn then to second ground relied upon by the Ministry for the exclusion of Ms. Neely and Ms. Stewart; namely, that they are employed in a confidential capacity in matters relating to employee relations. In respect of this ground of exclusion, the Ministry relies primarily on the duties performed by the Unit Supervisor assigned to the Payroll/Personnel Section. Among the duties of this incumbent is the responsibility for ensuring the accuracy and confidentiality of personnel files.



While there is no doubt that the material contained in the personnel files is confidential, in the Tribunal's view, it cannot be said that the material is confidential in relation to employee relations within the meaning of Section 1.(1)(1)(vii) of the Crown Employees Collective Bargaining Act. In this regard, the Tribunal notes that a similar issue was considered by the Ontario Labour Relations Board in Retail Clerks Union, Local 206 Chartered by the Retail Clerks International Union v. Frito-Lay Canada Limited v. Group of Employees and the Board concluded as follows:

The evidence indicates that the payroll clerks maintain the individual files of both the plant employees and the office employees. These clerks file any material relating to the disciplining of employees, any material relating to grievances that might be lodged, any information relating to merit increase, and, on occasion, probationary assessments and medical assessments. These clerks prepare a monthly report setting out the total hours worked in each department for the month, and also a weekly manning report setting out the number of employees working in the plant during the week. As well, these clerks prepare the payroll and distribute cheques to supervisors for further distribution. The clerks also assist in the preparation of a year-end report setting out all pertinent payroll information for the year. During negotiations the payroll clerks are sometimes requested to supply certain information concerning the payroll.

While the evidence indicates that the payroll clerks have regular access to a certain amount of confidential information, the Board is not convinced that this type of information is integral to the conduct of collective bargaining by the respondent. These payroll clerks merely collect and collate individual payroll information relating to individual employees. Access to such information does not make them privy to the respondent's industrial relations strategy, and the Board must conclude that these employees are not employed in a confidential capacity in matters relating to labour relations.

Similarly, the fact that the Unit Supervisor is responsible for the accuracy and confidentiality of personnel files does make her privy to the Ministry's labour relations strategy. Accordingly, the exercise of this responsibility does not lead the Tribunal to conclude that either of the incumbents is employed in a confidential capacity in matters relating to employee relations.

At the time the present application was filed, the Unit Supervisor assigned to the Payroll/Personnel Section was also responsible for maintaining grievance files and the evidence indicates that such files contain the grievance and replies and, in some cases, also include minutes of grievance meetings. Ms. Neely, testified, however, that she has never come across any memorandum from management addressing the merits of a particular grievance and the Ministry offered no evidence to suggest that such documentation is kept in the grievance files. Accordingly, there is no basis for concluding that responsibility for grievance files would make the incumbents privy to management's strategy in dealing with individual grievances. The Tribunal also notes that since January of 1991, the grievance files have been in the possession of the Head, District Administration, and it would appear that the Unit Supervisor is no longer responsible for maintaining these files.



Although the Ministry also relied on the requirement for the Unit Supervisor assigned to the Payroll/Personnel Section to serve as a resource person at a disciplinary interview, the evidence indicates that Ms. Neely performed this function on only one occasion. As the Union was also present, the interview cannot be regarded as confidential but in any event, Ms. Neely's role was limited to taking minutes of the meeting and there was nothing to suggest that she provided any input with respect to the action to be taken by management. Accordingly, once again, this function does not support the exclusion of the Unit Supervisor from the bargaining unit.

Finally, the Ministry relied upon the counselling provided to employees with respect to pension qualifications as well as the requirement to explain and discuss benefits and terms and conditions of employment with new and current employees. The position specification also provides that the Unit Supervisor advises managers regarding Ministry interpretation of specified legislation as well as the Collective Agreement.

In respect of the duties outlined, the evidence indicates that the incumbents of the Unit Supervisor position are engaged primarily in answering questions of employees based upon documentation provided to the incumbents by the Ministry. In the event that this documentation does not contain the information required, the incumbents contact the District personnel office

and then relay the information to the employee. There was no suggestion that the incumbents could commit the Ministry to a particular labour relations policy nor is it clear from the evidence that they have access to information which would place them in a genuine conflict of interest.

In any event, as indicated previously, prior to December of 1989, the position of Unit Supervisor was included in the bargaining unit for approximately nine years. Ms. Neely has performed the duties of the position since 1985 and it was her evidence that during the period prior to the exclusion and thereafter, there was no significant change in job duties. The Ministry offered no evidence from any member of management involved in the supervision of this position to contradict Ms. Neely's evidence in this regard. Moreover, no member of management came forward to suggest that the inclusion of the Unit Supervisor position in the bargaining unit has impaired the incumbents' ability to perform their job duties.

In the result, the Tribunal finds that there is no compelling evidence to demonstrate a need for a change in the status quo. In fact, given the absence of any evidence to indicate a change in job function and the lengthy period during which the position of Unit Supervisor was included the bargaining unit without any apparent impairment of function, we find Ms.

Neely and Ms. Stewart to be employees for purposes of the Crown Employees Collective Bargaining Act.

DATED AT TORONTO, this 9th day of December, 1991.

Jane H. Devlin  
Jane H. Devlin - Vice Chairperson

"M. Sullivan"  
M. Sullivan - Member

See Dissent Attached  
R. Redford - Member

**DISSENTING AWARD OF R. W. REDFORD  
IN THE MATTER OF T/0067/89  
BETWEEN OPSEU (NEELY AND STEWART)  
AND THE CROWN IN THE RIGHT OF ONTARIO  
(MINISTRY OF TRANSPORTATION)**

Having had the opportunity to review the award of the majority, I find that I must dissent. In my view, the decision should have been to exclude the complainants from this bargaining unit, both on the basis of the merits of the case and particularly in view of the unique circumstances surrounding the matter.

Turning first to the merits, it is clear that the incumbent unit supervisors had supervisory responsibility and that they were also involved in confidential matters relating to labour relations. The majority canvassed the evidence and in every case dismissed the reality as either insufficient in quantum or not quite enough in weight to reach effective recommendation stage, or in some other way falling short of the test.

In my view one must look at the totality of the evidence in making this judgement. It is insufficient to discount or dismiss each separate piece of evidence without standing back and assessing the total impact it collectively had on the whole position.

It is worth noting that the original reclassification recommendation of Ms. Etmanski was based on the performance of personnel and confidential functions related to labour relations. This whole issue did not arise from the fact that the Ministry suddenly felt the need for an exclusion, but only after careful assessment based on the employee's input into a new job description and presumably their testimony at the stage two meeting. The evidence on which Ms. Etmanski made her recommendation included that canvassed by the majority award. However, the majority interpretation of that data was different.

The Unit supervisors were involved in performance reviews and provided the base information for the review. Changes were made to approximately one half of the reviews, but this does not mean that those changes were substantive, or that they were any more than just an adjustment for uniformity across the system.



Disciplinary matters were also part of the Unit Supervisor's function. Surely counselling or verbal warnings to subordinates are "supervisory" within the context of Section 40 (1). Similarly, attending to lateness issues, performance issues, and in general dealing with employment conditions is what is meant by supervision in Section 40 (1) (iii). The fact that the Supervisor's testimony was that she did not see this as "disciplinary" does not preclude the conclusion that it is. In fact the warnings and counselling to which she testified go to the very heart of discipline process, at the stage where corrections may be obtained without the necessity for punishment in the form of more formal treatment. These management actions are in every sense of the word disciplinary in that their purpose is to correct unwanted behaviour.

Staff selection is another matter which falls directly into the supervisory area, within the meaning of the Act. The Chairperson relies heavily here on the fact that they did not really make up the questions to be asked or to act as chairperson. The inference is that you not only must be party to this decision making, but in some sense its author or leader. I believe that the gate being erected by the Chairperson is simply too high. The facts are, that they are part of this decision process. That automatically puts them in a supervisory capacity and with the accompanying conflicts which bargaining unit membership would produce.

In the same fashion, the Chairperson attempts to downplay the portions of the job which are confidential with respect to labour relations matters. Once again, the facts are that they are involved in grievance meetings, they do have access to sensitive information and they do provide interpretations of employee relations policies which are clearly managerial.

As I said earlier, all of this evidence must be taken in the context of the whole job, and must be assessed in total. There is no indication that the Chairperson did make this complete assessment of all of the factors. If she had, the conclusion must be that in total, when both the supervisory and the confidential aspects are considered, the position must be excluded from the unit.

In my view, to leave the position within the bargaining unit puts portions



of the function in a conflict situation and means that the effectiveness with which those aspects of the job can be performed is impaired. This in turn, I submit, impairs the efficiency of the operation.

The next proposition put forth by the chairperson is that the fact that the position has existed within the bargaining unit erects a barrier. In order to remove the position from the unit, a higher test needs to be applied.

First, the evidence is not quite what the chairperson states. While there may have been positions within the bargaining unit which were called Unit Supervisor for nine years as she states at page thirty-three of her award, there is also the somewhat conflicting evidence on her page twenty-nine that the position was divided into four positions at one time not two as is the case now. The four position configuration was in effect sometime before 1985. This means that the position may only have existed for two years prior to the 1987 beginning of the instant issue.

Further, the fact that this position existed for any period prior to the issue being raised should not preclude its now going to the correct status, outside of the bargaining unit. The fact that management is opposing the positions staying in the unit is evidence enough that the efficiency of the operation would be better served if the positions were outside the bargaining group.

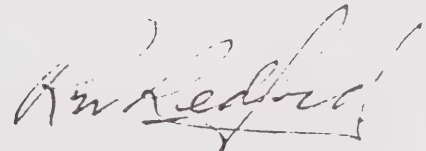
This case is also exacerbated by the fact that management has been made the victim of two tribunal's errors. The first was the decision by the GSB to hold management to the recommendation of Ms. Etmanski. This case, it is important to note was not settled on the merits of the issue, but rather on the technical grounds that the Ministry should not be allowed to move away from a recommendation of its representative at a second stage hearing. The Ministry was estopped from doing so.

Having been saddled with that decision, the Ministry now comes to retrieve what should follow from the Etmanski resolution. That is that the positions should be excluded. In other words, if they should be put back to where they were which was that they would be reclassified and would be excluded.

The net result of the instant decision is that it compounds the problem. The GSB cuts one way and the Tribunal cuts the opposite way. Surely this cannot be an appropriate conclusion we now force the parties to live with? This is particularly so when the merits themselves would suggest the position should be excluded. It is as if the Tribunal made the decision blind to the facts surrounding the case and/or choosing to ignore the impact of the decision made by its sister body.

I cannot support the majority award either from the point of view of the merits, nor from the so called historical perspective, and certainly not when consideration is given to the impact of the GSB decision. The Tribunal should not only be guided by the Act, but must also consider the practical impact of its decisions and of the decision of its sister bodies. In my view this perspective has not been given proper weight in the majority decision.

I would have excluded the Unit Supervisor position at the Ottawa District Office bargaining group.

A handwritten signature in dark ink, appearing to read 'R. W. Redford', with a stylized flourish at the end.

R. W. Redford  
November 29, 1991













